TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted]142

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

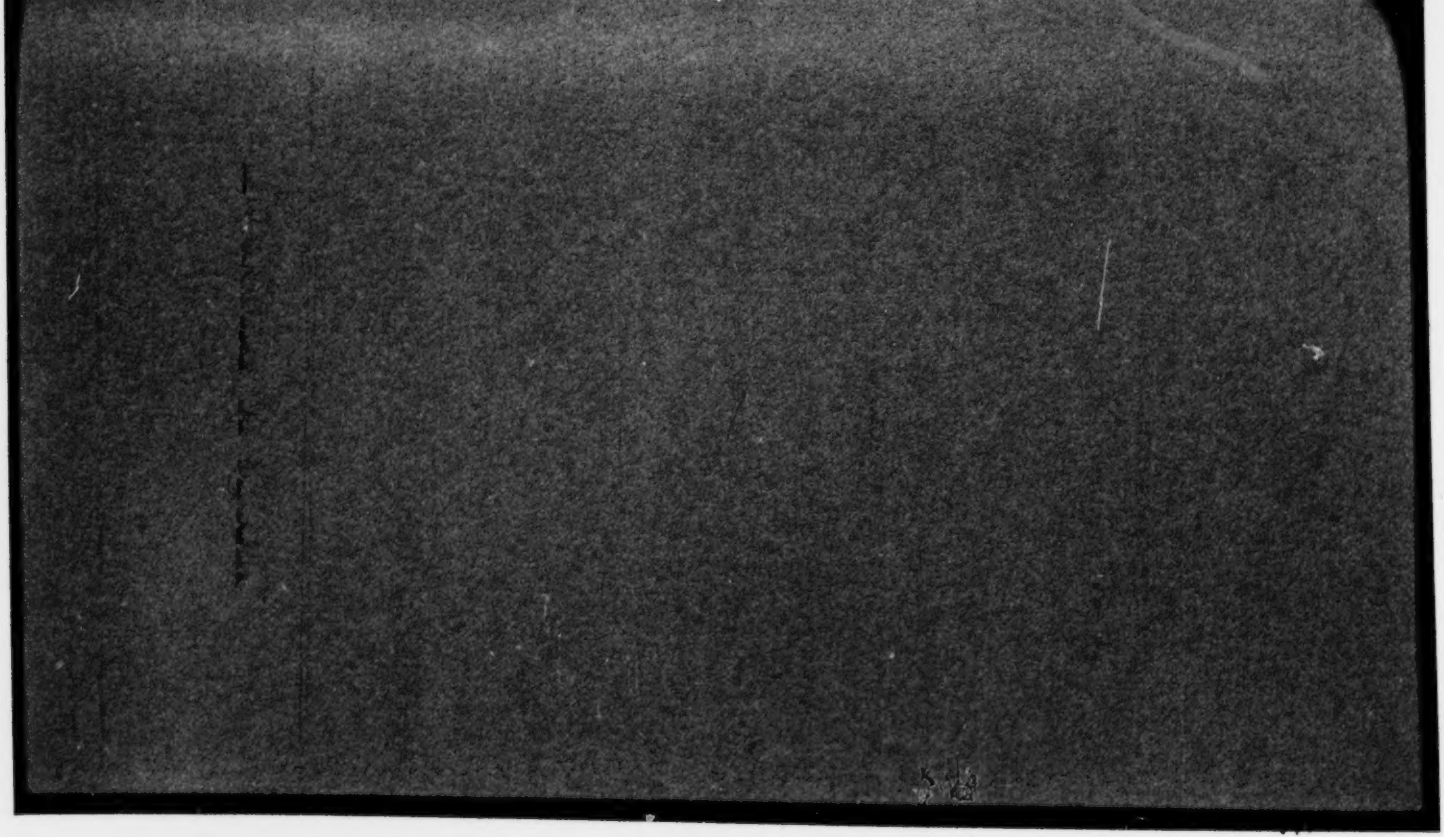
ELIZABETH VAN ZANT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

PETITION FOR CERTIORARI FILED AUGUST 12, 1922.

CERTIORARI AND RETURN FILED NOVEMBER 16, 1922.

(23,418)



(28,418)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 463.

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vs.

ELIZABETH VAN ZANT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it remembered that, heretofore, to-wit, on the 11th day of June, 1919, there was filed in the office of the clerk of the Supreme Court of the State of Missouri, in a cause between Elizabeth (Goodrich) Van Zant, Respondent, and The Kansas City Southern Railway Company, Appellant, No. 21819, a certified transcript of the judgment of the Circuit Court of Jasper County, at Joplin, Missouri, and of the order of said circuit court granting an appeal from said judgment to the Supreme Court of the State of Missouri, which said transcript of said judgment and of said order granting an appeal is in the words and figures following, to-wit:

2 In the Circuit Court of Jasper County, Missouri, at Joplin, April Term, 1919.

STATE OF MISSOURI,
County of Jasper, ss:

Be it remembered, That on the 28th day of May, 1919, the same being the 37th judicial day of said term of said Court, among others, the following proceedings were had to-wit:

No. 24769.

ELIZABETH (GOODRICH) VAN ZANT, Plff.,

vs.

KANSAS CITY SOUTHERN RAILWAY CO., Deft.

Now at this day this cause comes on for trial, the plaintiff appears by Lee & Kenney and Hugh Dabbs, her attorneys, the Defendant by Cyrus Crane and Ray Bond, its attorneys, and both parties announce ready, waive a jury and submit this cause to the Court for trial. After hearing all the evidence and being fully advised in the premises the Court finds that the defendant is justly indebted to the plaintiff in the sum of Eight Thousand Dollars ($8,000.00) and that plaintiff is entitled to recover of and from the defendant that amount as her debt and damages herein.

It is therefore ordered and adjudged by the Court that the plaintiff have and recover of and from the defendant the said sum
3 of $8,000.00 the amount of debt and damages so found due by the Court as aforesaid together with the costs of this cause and that execution issue therefor.

And on the same day the further following proceedings were had in this cause, to-wit:

No. 24769.

ELIZABETH (GOODRICH) VAN ZANT, Plff.,

vs.

KANSAS CITY SOUTHERN RAILWAY CO., Deft.

Now comes the defendant and files herein its affidavit for an appeal, said affidavit being by the Court examined and deemed sufficient and appeal in this cause is granted to the Supreme Court of this State.

STATE OF MISSOURI,
County of Jasper, ss:

I, A. E. Taggart, Clerk of the Circuit Court within and for the County and state aforesaid hereby certify that the above and foregoing is a full, true and complete copy of the judgment and order granting an appeal in the cause therein named as fully as the same appears of record in my office.

Witness my hand and the seal of our said Court. Done at office in the City of Joplin, Missouri, this 31st day of May, 1919.

[SEAL.] A. E. TAGGART,
Clerk.

4 And thereafter, and on the 18th day of December, 1920, there was filed in said cause the Appellant's Abstract of the Record, which said abstract of the record is in the words and figures following, to-wit:

In the Supreme Court of Missouri, October Term, 1920. (January Call).

No. 21819.

ELIZABETH (GOODRICH) VAN ZANT, Respondent,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Appeal from Jasper County Circuit Court.

Honorable Grant Emerson, Judge.

APPELLANT'S ABSTRACT OF THE RECORD.

This action was instituted in the Circuit Court of Jasper County, Missouri, at Joplin, by the filing of petition and issuance of summons thereon August 20, 1917. Amended petitions were filed, which are

not necessary to be reproduced or abstracted because no point is made in that regard. The case was tried on a duly filed third amended petition, which, omitting caption and signatures, is as follows:

5 *Third Amended Petition.*

Plaintiff, for her third amended petition, states that prior to the transaction complained of and set forth in this petition her name was Laura A. Goodridge, and that before said dates her former husband, —— Goodridge, having died, she intermarried with one —— Van Zant; that at the time of the transactions herein complained of her name was Laura A. Van Zant, but that she was often called and known as Elizabeth Goodrich; that the Elizabeth Goodrich mentioned in the petitions heretofore filed in this cause and the plaintiff, Laura A. Van Zant, is the identical and same person.

That the defendant, Kansas City Southern Railway Company is and was at all times herein mentioned, a corporation and as such was the owner of and operating a line of railroad as a common carrier of passengers in and through the County of Newton and State of Missouri; that on or about the 9th day of August, 1917, plaintiff was a passenger upon one of defendant's passenger trains operated by defendant over said line of railroad, and as such passenger was entitled to transportation over said road to her place of destination.

Plaintiff states that it became and was the duty of the defendant, as common carrier aforesaid, to well and safely carry and transport plaintiff and to deposit her in safety at her destination; but plaintiff says that defendant, unmindful of its duty in said premises and in violation of its contract and duty aforesaid to plaintiff as such passenger, failed to carry plaintiff well and safely and to deposit her in safety at her destination, but so carelessly and negligently

6 conducted itself in the premises that said train and the coach and car thereof in which plaintiff was riding and being carried was caused to be derailed and wrecked while plaintiff was a passenger thereon, as aforesaid, at a point on defendant's railroad about three miles north of the City of Neosho, in Newton County, Missouri, by reason of which plaintiff, without fault on her part, was by said carelessness, negligence and want of care of defendant, its agents, servants and employees in charge of its railroad and train, violently thrown from the seat in the coach in which she was riding upon and against a seat on the opposite side thereof, and from there to the floor of said car, thereby greatly bruising, hurting and injuring plaintiff in this, to-wit: plaintiff's body, back, spine and legs were bruised and severely injured, and that plaintiff's entire nervous system was permanently shocked and impaired as the result of said injuries, and that plaintiff was thereby severely injured internally and her internal organs, including peritoneum, bowels and stomach were severely injured, and plaintiff's peritoneum was thereby bruised, injured and inflamed, and as a result therefrom caused to be developed peritonitis resulting in the cæcum and ileum of the bowels being glued and stuck together thereby causing adhesions between the Fallopian tube and ovary to

the bowels on plaintiff's right side, and that by reason of such injuries and developments plaintiff was compelled to undergo a major and dangerous surgical operation, and have removed and taken out her Fallopian tube, ovary and appendix.

Plaintiff states that she was wholly dependent upon her own earnings for a livelihood and by reason of said injuries has lost
7 and will, in the future, lose a great amount of time and money; that prior to said injury she was in good health and capable not only of attending to her house work, but devoting all her time to the labor of cooking and work at hotels and other work; that on account of said injury and said operation she has since been and is now unable to perform her household work or perform labor in and about the house and work for other people; that she is unable to walk except with great pain and trouble; that she has suffered great pain and mental anguish on account of said injuries, and that said injuries are permanent and that she will continue to suffer great pain therefrom in the future; that she has been subjected to and incurred great expense and obligations for medical and surgical treatment and operations, hospital and nursing fees, and for medicines, as above stated, in an effort to heal and relieve said injuries and will in the future be compelled to expend large sums for medical treatment and attention, and that by reason thereof plaintiff has been damaged in all in the sum of Twenty-five Thousand Dollars.

That said train and coaches — so derailed and wrecked, and plaintiff's said injuries and damages were, as aforesaid, caused by reason of the carelessness and negligence of defendant, its agents, servants and employees, and by reason of said injuries and the result of the negligence and carelessness of defendant, its agents, servants and employees, as aforesaid, plaintiff has been damaged in said sum of Twenty-five Thousand Dollars, for which amount she is entitled to and prays judgment against defendant in this action, and for costs.

8 *Defendant's Answer.*

After various motions attacking the petition and other motions which are not necessary to be reproduced or abstracted, because no point is made with reference to same, the answer of defendant duly filed, omitting caption and signatures, was as follows:

Answer to Third Amended Petition.

Comes now the defendant in the above entitled cause, and for its answer to plaintiff's third amended petition, denies each and every allegation in said third amended petition contained.

Further answering said third amended petition, defendant states that the defendant above named is an interstate carrier of passengers and freight by rail; that at the time of the alleged injury to plaintiff mentioned in her third amended petition, plaintiff was riding on one of defendant's passenger trains on a free pass, or free transportation, issued to her under Article Five of the Federal Law known as the Interstate Commerce Act, which permits the issuance of said free

transportation to employees of railroad companies and their families; that at the time said pass was issued, a minor son of the plaintiff was an employee of the defendant and the plaintiff herein and her son were living together as a family, and said minor son of plaintiff was supporting, or assisting in the support of plaintiff; that said pass was issued on his account; was an interstate pass good between Pittsburg, in the State of Kansas, and Howe, in the State of Oklahoma; that said pass contained the following conditions, to-wit:

9 "The person accepting and using it, (the pass) thereby assumes all risk of accident and damage to person and baggage."

and also the following conditions:

"I also represent and declare that I am not prohibited by Federal or State law from receiving free transportation and this pass will be lawfully used."

Further answering defendant states that said pass being interstate, issued under the Federal law above mentioned, is to be interpretated and controlled in its effect and operation by decisions of the Federal Courts construing said Federal Act; that under said decisions the conditions on said pass above quoted are valid and binding on the plaintiff and by reason thereof, plaintiff having assumed all risk of accident and damage to her person is precluded and prevented from recovering damage on account of the matters and things, or any of them, alleged in her third amended petition.

Wherefore, having fully answered, defendant prays judgment and for its costs.

Reply.

Plaintiff's reply duly filed, omitting caption and signatures is as follows:

For reply to defendant's amended answer, plaintiff admits that defendant is an interstate carrier of passengers and freight by rail; admits that at the time of the alleged injury to plaintiff, mentioned in her amended petition, plaintiff was riding on one of defendant's passenger trains; admits that plaintiff was riding upon a pass

10 which was issued to her by defendant without pay and that said pass entitled plaintiff to passage on defendant's road between Pittsburg, Kansas, to Howe, in the State of Oklahoma, and that defendant's said road, over which plaintiff was riding on said pass, passed through the State of Missouri, and that it was while riding on said pass on defendant's said road in the County of Newton, State of Missouri, that plaintiff was injured on account of the negligence of said defendant , as alleged in plaintiff's petition.

Plaintiff alleges and states that at the time she received her pass she was residing in Pittsburg, in the State of Kansas, and that her son, who was a minor, under twenty-one years of age, was in the employ of defendant railroad and was living with plaintiff; that at said time plaintiff was working for wages at the Stillwell Hotel in

said city of Pittsburg, and had her home separate in said city and that her said son resided with her in said home. Plaintiff states that her said son while so employed by defendant, procured said pass for plaintiff, his mother, and that she paid no money or other valuable consideration therefor.

Plaintiff further states that in accepting said pass she did not and could not assume the risk of accident and damage to her person and baggage, caused by the negligence of defendant.

Plaintiff states that the provisions of sections 8483, 8476 and 8477, Article 3, Chapter 98, of the General Statutes of the State of Kansas, 1915, relating to railroad and other carriers, then in force in said state where said pass was issued, provided that all contracts, rules, regulations or devices whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from
11 any liability or damage created or caused by the acts, neglect or carelessness of such common carriers, shall be void. Plaintiff states that under said statute and under the common law then in force in Kansas, the alleged provision on the back of said pass, as set out in defendant's answer, was void and of no effect and against public policy, in that defendant was prohibited by said statute and by the common law of Kansas from entering into any such agreement or stipulation as a part of a contract of passenger carriage exempting it from liability for its negligence, and that as a gratuitous passenger, riding on a free pass, said contract being so in violation of said law did not and could not deprive plaintiff of her right to recover for her injuries, set out in plaintiff's petition, caused by the negligence therein pleaded.

Plaintiff further states that she received her injury, as set out in her petition, while riding on defendant's train in Newton County, Missouri. Plaintiff states that the laws of the State of Missouri, then in force, govern and control the provisions of the pass and transportation arrangement between plaintiff and defendant, and that the laws of said state in force at said time controlled and determined plaintiff's right to recover in this action, said action being commenced in the courts of said state and plaintiff's said action not being based upon any Federal Statute or any Federal law, but upon the common law liability in force in said state at the time, providing and holding that defendant is liable to plaintiff under the facts as stated in plaintiff's petition, for negligently and carelessly causing plaintiff's injury, as alleged in her petition. Plaintiff states that under the law of
12 the State of Missouri, then in force, the alleged provision and endorsement on the back of the pass, as pleaded in defendant's answer, providing that plaintiff assumed all risk of accident and damage to her person while riding on said train, under said pass, was void as against public policy and cannot be pleaded by defendant as a defense, in so far as the same (if it does) undertook to contract that defendant was not liable for its negligent acts causing damage to plaintiff, as alleged in her petition, while a passenger on defendant's said road.

Plaintiff states that this action was and is brought in the Circuit Court of Jasper County, Missouri, under the laws of the State of Mis-

souri, and that the defendant's liability to plaintiff and the validity of the alleged contract on the back of said pass is governed, as to its legality and effect, fully and wholly, by the laws of the State of Missouri, where said injury occurred and where said suit is brought and is to be tried.

Plaintiff states that under these facts the responsibility of the original decision in this case rests upon this court and the courts of the State of Missouri and not upon the United States District or Appellate Courts, and that the decisions and laws of the State of Missouri, above set forth, obtain and are the rule of action in this case, and that the rights of the parties are to be determined thereunder.

Plaintiff denies the allegation in defendant's answer, that the alleged provision in said pass is to be interpreted and controlled in its effect and operation by the decision of the Federal Courts construing said Act, and plaintiff denies that the provisions and conditions in said pass, which are in violation of the laws of the
13 State of Missouri, where said injury occurred, and of the State of Kansas, where said pass was issued, are valid and binding upon the defendant; and denies that plaintiff assumed or could assume any risk of accident or damage to her person, caused by the negligence of defendant, while riding on said train under said pass.

Plaintiff further denies each and every allegation in said answer contained not herein admitted or specifically denied.

Trial, Judgment and Subsequent Proceedings.

This case was tried at the April 1919, term of said Circuit Court of Jasper County, and the trial completed and judgment rendered by the court against the defendant on the 28th day of May, 1919. During the trial, for the purpose of shortening the proceedings and fixing the amount of damages, a jury was waived, by agreement of parties. Order to that effect duly entered, and the following stipulation made between the parties, offered in evidence and made part of the record:

Stipulation.

(Omitting Caption and Signatures.)

Without any concession by either party as to what the final judgment in this case should be, but solely for the purpose of shortening the trial and the introduction of testimony, it is agreed and stipulated as follows:

1. If the Court finds the issues in favor of the plaintiff, he
14 may fix her damages at Eight Thousand ($8,000.00) Dollars.

2. Plaintiff agrees not to remit any amount therefrom should judgment be in her favor.

3. Defendant agrees it will not (if judgment goes against it) either on motion for new trial or on appeal urge or claim that said amount is excessive.

4. Both parties agree that in fairness to them this stipulation should not in any wise be taken or used by the trial Court or any Appellate Court as an indication of how either party thinks or believes this cause should be or is going to be decided.

The Court found the issues in favor of the plaintiff and pursuant to said stipulation, entered judgment in her favor for the amount of Eight Thousand ($8,000) Dollars on May 28, 1919, at said April term. Record entry was duly made of said judgment. Thereafter during said term, and within four days after the rendition of the decision and judgment aforesaid, and on the 28th day of May, 1919, defendant duly filed its motion for new trial (said motion will appear in full at a subsequent page of this abstract and in the bill of exceptions). Defendant's said motion for new trial was heard by the court on the 28th day of May, 1919, at the same term of court, and was overruled, and record entry of such order of overruling the same properly made, and defendant duly excepted and saved its exception to the order overruling said motion.

15 *Bill of Exceptions and Appeal.*

The defendant was given until the 3rd day of September, 1919 term to file bill of exceptions. On that day which was September 17, 1919, the time for filing of bill of exceptions, by order duly entered by the court, was extended and on the 10th day of June, 1920, and within the time allowed and extended by the court, the defendant filed its bill of exceptions and the same was signed, sealed and mad a part of the record, by the Honorable Grant Emerson, Judge of Di vision Two, of the Jasper County Circuit Court. All pursuant to and in compliance with the requirements of law. Defendant taking all necessary, proper and legal steps thereunto, was allowed an appeal of this cause to the Supreme Court of Missouri, such appeal was duly taken and lodged in this court by filing herein within the time allowed by law, a certified copy of the judgment and order allowing appeal.

Bill of Exceptions.

The bill of exceptions was filed by defendant within the time allowed by the court duly and timely. In said bill of exceptions are preserved all of defendant's exceptions to adverse rulings of the court, on the admission and exclusion of evidence, giving and refusing of instructions or declarations of law, and its exceptions to the action and order of the court in overruling its motion for a new trial. In the following abstract of said bill of exceptions, all evidence
16 as to the injuries sustained by the plaintiff are omitted, in view of the stipulation agreeing as to the amount of damage in the event the finding of the court was for the plaintiff. The remaining evidence bearing on the question raised on this appeal, as appearing in said bill of exceptions, is as follows:

LAURA GOODRICH VAN ZANT, sworn as a witness on her own behalf, testified as follows:

Direct examination.

By Mr. Dabbs:

Q. You may state your name to the Court.
A. Laura Goodrich Van Zant.
Q. Your initials are Laura A. Van Zant?
A. Yes, sir.
Q. Are you the plaintiff in this case?
A. Yes, sir.
Q. You formerly lived in Pittsburg, Kansas?
A. Yes, sir.
Q. About when were you injured, Mrs. Goodrich?
A. On the 9th of August, 1917.
Q. Just about where?
A. Well I was injured in this side——
Q. I mean what locality?
A. Th-ee mile this side of Neosho, they told me.
Q. Know what county that is?
A. Well it is——

Mr. Crane: It will be admitted it is Newton County.
Mr. Dabbs: Newton County, Missouri.

Q. You were on the Kansas City Southern Railway Company passenger train?
A. Yes, sir.
Q. Where did you take that train?
A. Pittsburg, Kansas.
17 Q. What kind of a coach or car were you in?
A. Chair car.
Q. Know what time you left Pittsburg?
A. No I don't remember the exact time.
Q. Have you any idea whether day or night?
A. Yes, sir, in the morning.
Q. Before day-light?
A. No, it was after day-light.
Q. Where were you going, Mrs. Goodrich?
A. Well my pass was to Howe, Oklahoma, but I was going on to Holdenville to my brothers.
Q. You were leaving the state of Kansas and going through Missouri into Oklahoma?
A. Yes, sir.
Q. Did you have transportation?
A. Yes, sir.
Q. What was it?
A. Pass.
Q. Who got it for you?
A. My son.
Q. Where did he reside?
A. With me.

Q. In Pittsburg, Kansas?
A. Yes, sir.
Q. And he gave you the pass and what did you do with it, give it to the conductor?
A. Yes, sir, I guess so—the train employee; I don't know whether train auditor or conductor.
Q. Well you presented it on the train?
A. Yes, sir.
Q. Did you know the conductor?
A. No, sir.
Q. Just tell in your own language after you entered that train if anything happened to the train that caused you any disturbance or anything, tell the Court in your own language what it was and where.
A. Well the train was reported an hour late and of course I was sleepy when I got on the train and I went to sleep and I never knew until I fell over in the aisle and against the seat on the other side.
Q. You went to sleep while on the train in the chair car?
18 A. Yes, sir.
Q. The first thing you knew was what?
A. I fell and some one hollowed "There is a wreck," some man, a man's voice, and they walked on me in the aisle. I fell against a seat on the other side. There was no one sitting in the seat by me and I was sitting alone on the east side of the car. I went against the seat on the other side and then I fell backwards, and several walked on me in the aisle.
Q. Fell how?
A. Fell backwards. The train pitched farward.
Q. Then you fell backwards where?
A. Back into the aisle.
Q. You mean on the floor?
A. Yes, sir.

The remainder of plaintiff's testimony on direct examination deals entirely with her injuries.

Cross-examination.

By Mr. Bond:

Q. At the time of this accident you lived in Pittsburg, Kansas?
A. Yes, sir.
Q. A- what place?
A. 912 North Pine.
Q. How long had you lived there?
A. You mean in Pittsburg?
Q. Yes.
A. I think I had lived there about—let's see—I don't know exactly how long but a year or a little over.
Q. Who were you living with?
A. With my son, and I had some roomers, Doctor King and wife.
Q. That is the son that worked for the railway?

A. Yes, sir.
Q. What is his name?
A. John Goodrich.
Q. What kind of work did he do?
A. He had done most everything, but I think at the time he was working at machinist's helper.
19 Q. Know how much wages he was making?
A. No, sir.
Q. He was single?
A. Yes, sir.
Q. And you were single, that is, you had separated from Mr. Van Zant?
A. Yes, sir.
Q. You and your son lived at the time at the place you mentioned?
A. Yes, sir.
Q. He slept there?
A. Yes, sir.
Q. And ate his meals there?
A. Yes, sir.
Q. That was the home of both of you?
A. Yes, sir.
Q. He also helped pay the grocery bills?
A. He gave me his check at the end of each week and I spent it for all our bills.
Q. He gave you his check at the end of the week and you used that money toward keeping up the home?
A. Yes, sir.
Q. You lived there in that fashion and were at the time this trip was undertaken?
A. Yes, sir.
Q. And at the time this pass was given to you?
A. Yes, sir.
Q. Pass was issued to you on account of your son?
A. Yes, sir.
Q. At the time of the issuance of this pass and at the time of this trip, you and your son constituted your family in Pittsburg?
A. Yes, sir.
Q. He made the application for the pass?
A. Yes, sir.
Q. And it was issued under the name of Mrs. L. A. Goodrich?
A. Yes, sir.
Q. That was by reason of the fact that his name was Goodrich?
A. Yes. He didn't know but what mine was Goodrich. He thought after I and Mr. Van Zant separated I had gotten a divorce.
20 Q. You had gone under the name of Goodrich?
A. Always had.
Q. This pass was issued in that name?
A. Yes, sir.
Q. It was a pass in two parts, rather a long paper and perforated?
A. No, it was a little piece.

Q. It had two parts?
A. Yes, sir.
Q. And the conductor tore it in two and kept part of it and handed the other back?
A. Yes, sir.
Q. It was a round trip pass?
A. Yes, sir.
Q. He took the part for the going part and *and* handed you the returning portion?
A. Yes, sir.
Q. You still had that when the accident happened?
A. Yes, sir.
Q. Have you that now?
A. No, it was misplaced at the hospital.
Q. But you did have it at the time of the accident?
A. Yes, sir.
Q. And since that time have misplaced it in some way?
A. Yes, sir.
Q. Handing you Exhibit 1 I will ask you whether or not that is the part of the pass the conductor took up, that is the going part of the pass you rode on?
A. I don't know; I guess it is.
Q. That is the name the pass was issued in, Mrs. L. A. Goodrich?
A. Yes, sir.
Q. And that is the name of the son, dependent mother of J. M. Goodrich, those are the initials of the boy?
A. Yes, sir.
Q. Occupation: Flue borer from Pittsburg to Howe?
A. Yes, sir.
Q. You have misplaced the other part of the pass?
21 A. Yes, sir, but I thought it was blue instead of gray.
Q. You were going from Pittsburg to Oklahoma?
A. Yes, sir.
Q. The pass called for continuous trip from Pittsburg to Howe, Okla.?
A. Yes, sir.
Q. And you were going beyond that a little bit to Holdenville on another road?
A. Yes, sir.
Q. You got on the train at Pittsburg?
A. Yes, sir.
Q. Came on the road from Kansas into Missouri and the accident happened in Newton County, Missouri?
A. Yes, sir. I didn't remember the county.
Q. Well north of Neosho in Missouri?
A. Yes, sir.
Q. You had asked your son to get this pass for you?
A. Yes, sir.
Q. And he did that in compliance with your request?
A. Yes, sir.
Q. You were 33 years old at this time I believe you stated?

A. Just about.
Q. You had been married twice?
A. Yes, sir.
Q. Had you had any other children besides this boy?
A. No, sir.

The remainder of the cross-examination related to the matter of injuries.

Dr. A. L. CARPENTER, witness on behalf of plaintiff, testified entirely with regard to plaintiff's injuries.

At this point a jury was waived and plaintiff asked leave of court to amend the petition which was granted. The same was
22 amended and appears as the Third Amended Petition, and is set out in full in this abstract. The further trial of the case was continued until the next regular term of court, with the agreement that the testimony already taken remain in the record and be considered by the court in the further trial of the cause as testimony and evidence therein. At the next regular term of the court, the following occurred:

JOHN GOODRICH, sworn as a witness on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Dabbs:

Q. What is your name?
A. John Goodrich.
Q. How old are you?
A. 17.
Q. Where do you live?
A. Joplin, Missouri.
Q. Where do you work?
A. Eagle-Picher Lead Works.
Q. And you are the son of the plaintiff in this case?
A. Yes, sir.
Q. You live with her?
A. Yes, sir.
Q. Formerly lived in Pittsburg?
A. Yes, sir.
Q. You then worked for the Kansas City Southern Railroad Company?
A. Yes, sir.
Q. In what capacity?
A. Well, I worked at several. At the time I was working as flue borer in the round house.
Q. At the time your mother started on this contemplated visit to Howe, Oklahoma, were you working for the Kansas City Southern?
A. Yes, sir.

Q. And living with her in her home?
A. Yes, sir.
23 Q. What was your mother doing then; was she doing any kind of work?
A. Before she left she was working at the Stillwell Hotel three meals a day and was keeping house for me and doing the work at home.
Q. And you lived with her; that constituted the household, you and your mother?
A. Yes, sir.
Q. She was working at the Stillwell Hotel and keeping the house and you were working for the Kansas City Southern and taking the fruits of your labor and living on it?
A. Yes, sir.
Q. What was the condition of your mother's health and ability to get around and walk prior to the time she started on this trip?
A. She done all the work at the house, done her own washing and ironing and waited tables at the Stillwell Hotel.
Q. Do you know of any complaint or sickness or anything of the kind?
A. No, sir.
Q. You have been living with your mother since that, what do you say about her condition since that time?
A. Well, she isn't able to do any of her work to speak of now. I have to sweep all the floors and I have tried to do the washing, skinned up all of my knuckles trying to wash.

Mr. Crane: Move to strike out that answer as mere conclusion of the witness, what her ability is as an opinion.
The Court: Sustained.
Mr. Dabbs: Except.

Cross-examination.

By Mr. Crane:

Q. They call you "John." Is that your name?
A. Yes, sir.
Q. John, here is the application, this paper marked Exhibit 2, this is the application that you made for the transportation
24 for your mother, isn't it? That is your signature there?
A. Yes, sir, that is my signature.
Q. And this is your signature also on this little slip?
A. Yes, sir.

Mr. Crane: I want to introduce this in evidence.
Mr. Dabbs: Very well.

Said Exhibit 2, being in words and figures as follows, to-wit:

"8-4-17.

Mrs. L. A. Goodrich, age 38 yrs. is my mother Depending on me for support, living under the same roof.

J. M. GOODRICH.

Port Arthur Route.

K. C. S. R. R.

.....
(Insert Name of Railway Co.)

Employe's Application for Transportation.

8-4-1917.

W. H. Sagstelter,
M. M.:

Trip Pass, Card Pass.

If consistent, please furnish me transportation as indicated.
Half rate Refund.

For Mrs. L. A. Goodrich age 38 yrs. widow.
From Pittsburg to Howe, Okla., and return.
Via K. C. S. R. R.
Good until 9-4-17"

I hereby certify that the above named person is my dependent mother, a member of my family, residing with me, and entirely dependent upon me for support, (unemployed) and understand that the Interstate Commerce law permits issuance of Interstate transportation only to railroad employes and dependent members of their families, and that any person not entitled thereto under the law who uses free or reduced rate transportation is subject to a penalty of from $100.00 to $2,000.00 for each offense.

Name: J. M. GOODRICH.

Position—Flue borer.
Length of Service—2 mon's years.
Residence—Pittsburg, Kansas.
O. K.
W. H. SAGSTELTER.

Mr. Crane:

Q. Now after you had made that application who did you get the transportation from; who gave it to you, do you remember?
A. I don't remember.
Q. You don't remember how that came to you?
A. No, sir. I believe I went to the office and signed up for it.
Q. You got a pass for your mother. See if you recognize that as part of it? It was in two pieces, one going coupon and one return?
A. Yes, sir.
Q. That is the going coupon of that pass, that Exhibit 1?
A. Yes, sir.

Mr. Crane: All right. I offer that in evidence.

Said Exhibit 1, being in words and figures as follows:

26 "The Kansas City Southern Railway Company.

No. G34738.

Trip Pass.

Pass Mrs. L. A. Goodrich, account dep. mtr. J. M. Goodrich, flue borer, from Pittsburg to Howe.
Void if detached.
Issued by

A. M. CALHOUN."

Mr. Crane: Now, I offer in evidence the conditions printed on the back or reverse side of the pass on which plaintiff was riding at the time she was injured, which conditions are as follows, to-wit:

"Conditions.

Good for stop-over at will on application to Conductor.
This pass is not transferable, must be signed in ink by the holder thereof, and the person accepting and using it thereby assumes all risk of accident and damage to person and baggage.
Forfeited if presented by other than person named, and may be revoked without notice.
The above conditions are hereby agreed to.
I also represent and declare that I am not prohibited by Federal or State laws from receiving free transportation, and this pass will be lawfully used."

Mr. Dabbs: We object to the introduction of that agreement on the back of the pass for the following reasons: Because the agreement and conditions offered in evidence violate the laws of
27 the State of Missouri in force at the time of the accident or the alleged injury in that the agreement to the extent that it undertakes to relieve the defendant railroad company from liability for negligent acts is void under the laws of Missouri and against public policy and is also void—the conditions on the back of the pass are also void under the laws of the State of Kansas.
The Court: Objection overruled for the present.
Mr. Dabbs: Except.
The Court: The objection of the plaintiff to the introduction of the contract and agreement on the back of the free pass constitutes no defense in his case because void on the ground of public policy and under the law of Missouri, where the accident happened, and under the laws of Kansas, where the free pass was issued, is sustained, and said contract having been admitted in evidence during the trial, the Court reserving the right to pass upon this objection after the conclusion of the evidence and hearing of arguments, is now stricken out.
Mr. Crane: We except.

Thereupon the parties for the purpose of shortening the trial and the record as to evidence relating to extent of plaintiff's injuries, as alleged in amended petition and to dispense with further proof by either party on the subject of amount of damages, filed the following agreement relating to the question of amount of damages in said cause:

(This is the stipulation set out in the front part of this abstract) (at page——, agreeing that in the event the court should find for) (the plaintiff, her damages might be fixed at $8,000.)

28 This was all the evidence in the case except that relating to the plaintiff's injuries.

Thereupon, the defendant asked the Court to give the following declarations of law, which were by the Court refused, the defendant at the time duly excepting and now excepting to the action, ruling and refusal of the Court to give said declarations of law and each thereof, to-wit:

"A."

"The Court declares the law to be that under the law and evidence in the case, the finding must be in favor of the defendant and that plaintiff cannot recover." Refused.

"B."

The Court declares the law to be that if, at the time plaintiff was injured she was riding on one of defendant's passenger trains on an interstate trip between the states of Kansas ad Oklahoma, and that she was injured in the state of Missouri while on said interstate trip, and that plaintiff was, at that time riding on a free pass, good from Pittsburg, Kansas, to Howe, Oklahoma, and that said pass was issued to plaintiff by defendant on account of plaintiff's son being an employee of defendant, and that plaintiff was a member of the family of said son, and that said pass was an interstate free pass, then the stipulation on the back of said pass limiting the liability of defendant for any injuries which plaintiff might sustain while riding on said pass, was valid and binding and the plaintiff cannot recover and judgment must be in favor of the defendant. Refused.

29 Thereupon, during said regular term of Court, and on the said 28th day of May, 1919, the Court found the issues in favor of the plaintiff, and pursuant to stipulations of parties fixed her damages at $8,000.00, and rendered judgment in her favor and against defendant for that amount, which judgment was duly entered of record.

Motion for New Trial.

(Caption and Signatures Omitted.)

Now on this day comes the defendant The Kansas City Southern Railway Company and moves the Court to set aside the verdict and

judgment rendered in the said cause on the 28th day of May, 1919, and to grant the said defendant a new trial herein for the following reasons:

1. The verdict in said cause is against the evidence, against the weight of the evidence and against the law under the evidence.

2. The verdict was for the wrong party.

3. The court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiff.

4. The court erred in rejecting competent, relevant and material evidence offered by the defendant.

5. The court erred in rejecting and refusing to admit in evidence in the case the stipulation and condition contained on the back of the pass upon which plaintiff was riding at the time she was injured, offered by the defendant.

6. The court erred in rejecting and refusing to admit in evidence the stipulations and conditions contained on the back of the pass, issued to plaintiff by defendant, upon which plaintiff was
30 riding at the time she was injured.

7. The court erred in refusing to give the declaration of law, in the nature of a demurrer to the evidence, numbered "A," requested by defendant at the close of all of the evidence.

8. The court erred in refusing to give declaration of law numbered "B" requested by the defendant.

9. The court erred in failing and refusing to follow the decisions and holding of the Federal Courts and of the Supreme Court of the United States and the law as declared by such Courts in determining the validity and effect of the stipulation and condition on the back of the pass upon which plaintiff was riding at the time she was injured, limiting and precluding liability on the part of defendant for injuries which might be sustained by plaintiff while riding on said pass.

Wherefore, this defendant prays that a new trial be granted herein.

Which said motion coming on to be heard was by the Court on the 28th day of May, 1919, and during said regular term of court, overruled, the defendant at the time duly excepting and now excepting to the action of the Court in overruling said motion.

Thereupon, on the 28th day of May, 1919, and during said regular term of court, the defendant filed its affidavit for an appeal in this cause, and an appeal was allowed by the Court to the Supreme Court of the State of Missouri, and defendant given until on
31 or before the third day of the September, 1919, Term of this court within which to file its Bill of Exceptions.

The Order of Record granting said appeal is as follows:

(Caption and Signatures Omitted.)

"Now comes the defendant and files herein its affidavit for an appeal, said affidavit being by the Court examined and deemed sufficient, an appeal in this cause is granted to the Supreme Court of the State of Missouri."

And afterward, within the time so allowed by the Court for the defendant to file herein its Bill of Exceptions, to-wit; on the 17th day of September, 1919, being the 3rd day of the regular September, 1919 Term of said court, the Court by an order of record in term time, extended the time for filing Bill of Exceptions herein as follows, (Caption Omitted):

"For good cause shown it is ordered by the Court that the time for filing Bill of Exceptions in this cause be and the same is hereby extended until on or before the third day of the next regular term of this Court."

And now here, on this 10th day of June, 1920, and within the time so allowed and extended by the Court for filing Bill of Exceptions, herein, the defendant presents this, its Bill of Exceptions, and prays the Court that the same may be signed, sealed and made a part of the record herein, which is accordingly done.

32 Witness my hand as Judge of said Division of said Court, this the day and year last above written.

GRANT EMERSON,
Judge of Division Number Two,
Jasper County Circuit Court.

The foregoing is a fair abstract of the record and presents all of the record pertaining in any way to the questions raised by appellant on this appeal.

CYRUS CRANE,
ROY BOND,
Attorneys for Appellant.

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34 And thereafter, and on the 12th day of January, 1921, the following proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1920.

ELIZABETH (GOODRICH) VAN ZANT, Respondent,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Come now the said parties, by attorneys, and after argument herein, submit this cause to the Court.

And thereafter, and on the 6th day of June, 1921, the following further proceedings were had and entered of record in said cause, to-wit:

35 In the Supreme Court of Missouri, Division No. 1, April Term, 1921.

21819.

ELIZABETH (GOODRICH) VAN ZANT, Respondent,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Appeal from the Circuit Court of Jasper County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised

of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jasper County rendered, be in all things affirmed and stand in full force and effect; and that the said respondent recover against the said appellant her costs and charges herein expended and have therefor execution. (Opinion filed.)

And on the same day, to-wit, the 6th day of June, 1921, there was filed the opinion of the Supreme Court of Missouri in said cause, which said opinion is in the words and figures following, to-wit:

36 In the Supreme Court of Missouri, Division No. One, April Term, 1921.

No. 21819.

ELIZABETH (GOODRICH) VAN ZANT, Respondent,

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Action for personal injury. Plaintiff was a member of the family of her son, John Goodrich, who resided at Pittsburg, Kansas. The latter was an employe of the defendant, and on August 4, 1917, he obtained from his employer for his mother a free pass over defendant's railroad from Pittsburgh to Howe, Oklahoma. On August 9, 1917 while riding on this pass, on one of defendant's passenger trains, enroute from Pittsburg, Kansas, to Howe, Oklahoma, and while passing through Newton County, Missouri, plaintiff was seriously injured through the negligent management and handling of the train by defendant's employes. On the back of the pass this condition was printed: "This pass is not transferable, must be signed in ink by the holder thereof, and the person accepting and using it thereby assumes all risk of accident and damage to person and baggage."

The case was tried without a jury. The defendant asked the court to declare as a matter of law that the stipulation on the back of the pass was valid and binding and that by reason thereof plaintiff was not entitled to recover. This declaration was refused; the court found for the plaintiff and assessed her damages at $8,000,
37 the sum that had been stipulated in advance to be so assessed, in the event the finding was for the plaintiff. From the judgment rendered in accordance with the finding and assessment of damages defendant appeals.

It seems to be conceded by appellant that under the law of this State, as declared by its courts, a person travelling on a free pass granted him by the carrier is a passenger and not a trespasser or mere licensee; that such person is entitled to the same degree of care as any other passenger, and may hold the carrier liable for injuries resulting from its negligence or that of its servants; and that a condition annexed to his pass attempting to relieve the carrier of the consequences of its negligence is ineffective because against

public policy. (Bryan v. Railway, 32 Mo. App. 228; Huckstep v. Railway, 166 Mo. App. 330; Young v. Railway, 93 Mo. App. 267; Lemon v. Chanslor, 68 Mo. 340; Shearman v. Railroad, 72 Mo. 62; Padgitt v. Moll, 159 Mo. 143; Powell v. Railroad, 255 Mo. 420.)

Appellant contends, however, that, as plaintiff was traveling from one State to another on an interstate free pass, issued, as it alleges, in accordance with the provisions of the Hepburn Act (U. S. Comp. Stats. 1916 p. 9069, sub-div. 5 of sec. 8653), the rule of decision, with respect to the validity of stipulations in such passes exonerating the carrier from liability for negligence, followed by the United States Courts, and not that followed by the courts of this State, should be applied in deermining the question of defendant's liability.

In the trial of causes governed solely by common law in the United States courts, those courts follow their own understanding of the common law regardless of the decisions of the courts of the State in which the cause of action arose. (Bevtler v. Railroad, 224 U. S. 85; Fowler v. Railroad, 229 Fed. 374.) And the former courts have always held that under the common law, irrespective of any act of Congress regulating interstate commerce, stipulations in a free pass exempting a carrier from liability for negligence are
38 valid and enforceable. (Northern Pacific Railroad Co. v. Adams, 192 U. S. 440; Boering v. Railroad, 193 U. S. 442; Wiley v. Railroad, 227 Fed. 129.) The instant case, however, having been instituted in a state court of this State, on a cause of action which accrued in this State, and having been tried in such state court, is to be determined in accordance with our applicable local state law, unless that law has been superseded by some act of Congress in the regulation of interstate commerce. (Adams Express Co. v. Croninger, 226 U. S. 491.)

"Railroad corporations, like all other corporations and persons, doing business within the territorial jurisdiction of a State, are subject to its law. It is in the law of the State, that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons travelling on interstate trains are as much entitled, while within a State, to the protection of that State, as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, according to the law of the State, for acts of nonfeasance or of misfeasance committed within its
39 limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law." (Chicago, Milwaukee, &c. Railway v. Solan, 169 U. S. 133, 137, 138.)

It is claimed by appellant that all state laws on the subject of interstate free passes, including those relating to personal injuries negli-

gently inflicted by the carrier upon persons while being carried on such passes, were superseded, or annulled, by the Act of Congress of June 29, 1906, known as the Hepburn Act. That act provides:

"No common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their
40 families, * * *. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty."

Whether the provisions just quoted of the Hepburn Act have the effect contended for must be determined in accordance with the rule announced from time to time by the Supreme Court, in slightly varying phraseology, to this effect:

"When the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of
Congress fairly interpreted is in actual conflict with the law of
41 the State." (Savage v. Holmes, 225 U. S. 501, 533.)

The rule has been more tersely stated in this language: "To have the effect of superseding a state law it is not sufficient that a congressional regulation of commerce invades the same field; it must expressly cover the precise subject-matter or show a purpose to take legislative possession of the whole field." (12 C. J. 18.)

The plain and obvious import of that part of the Hepburn Act under consideration is to prohibit the issuance by an interstate carrier of interstate free passes to any persons, except those of certain designated classes, and to subject both the carrier issuing such a pass and the person using it, in violation of its prohibition, to certain penalties. With respect to the issuance of passes to persons coming within the exception, nothing is said; there is no reference whatever to the form or provisions of any such pass, or to the undertaking thereby assumed by the carrier issuing it; or to the liability, if any, that may be incurred in the transportation thereunder, for a failure on the part of the carrier to exercise care, or otherwise. As evidenced by the language, the sole purpose of the enactment of these

provisions was to prohibit the issuance of free transportation by interstate carriers. However, the issuance to certain classes of persons was excepted from the operation of the Act. So far as the cases coming within the exception were concerned the law remained unchanged. After the passage of the Act, as to the persons named in the exception, the carrier could issue free interstate passes, on such conditions, and under such stiplations, as it saw fit; or it could refuse to issue them at all, just as it could, and did do, prior thereto. The only regulation of interstate free passes undertaken by the Act was to prohibit their issuance and use—except with respect to the persons specifically excluded from its operation.

It is obvious, that if Congress, by the Hepburn Act, has
42 assumed the regulation of the duties (and the liability arising from their breach) pertaining to the transportation of persons under interstate free passes, in cases which are in terms excluded from the operation of the anti-pass provision of the Act, it must be because the Act as a whole, in its general scope and purpose, indicates that Congress has chosen to occupy the entire field of liability incident to the carriage of interstate passengers. What duty, if any, a carrier owes a gratuitous passenger is but a phase of the larger question of what duty it owes to passengers generally.

The objects sought to be attained by the original Interstate Commerce Act of 1887 (24 U. S. Statutes at Large, 279 c. 104) was to secure continuous carriage, and just and uniform rates, and to compel the furnishing of equal facilities. It contained no provision touching liability for negligence on the part of the carrier in carrying either persons or property. (Pennsylvania Railroad Co. v. Hughes, 191, U. S. 477, 487, 488.) The first legislation by Congress with respect to such liability was the Carmack Amendment to the Hepburn Act (34 U. S. Stats. at Large, 584, 585, c. 3591) and that dealt with the carriage of property only. (Adams Exp. Co. v. Croninger, supra.) The Act will be searched in vain for a correlative provision relating to the carriage of persons. The anti-pass provision of the Act was merely in furtherance of the purpose of the original Interstate Commerce Act to secure equality and prevent unjust discrimination.

Whether responsibility for personal injuries sustained by interstate passengers is still subject to the regulations of the several States does not seem to have ever been directly passed upon by the Supreme Court, but in Southern Pacific Co. v. Schuyler (227 U. S. 601, 612) it held that the anti-pass provision of the Hepburn Act does not deprive a party who accepts gratuitous carriage in interstate commerce, in actual but unintentional violation of the prohibition of *of*
43 the Act, of the benefit and protection of the law of the State imposing upon the carrier a duty to care for his safety.

The Supreme Court of Indiana, in passing upon the precise question under consideration here, held that the Hepburn Act and the Carmack Amendment thereto do not attempt to regulate liabilities of carriers of persons on valid free passes, and that such liabilities continue subject to state statutes. (Clark v. Railway, 119 N. E. 539.)

Our own conclusion is that Congress has not legislated on the sub-

ject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several States.

In accordance with the views herein expressed, the judgment nisi should be affirmed. It is so ordered.

WILLIAM T. RAGLAND,
Commissioner.

Brown, C., absent.
Small, C., concurs.

Per Curiam:

The foregoing opinion of Ragland, C., is adopted as the opinion of the Court.
All the judges concur.

44 And thereafter, and on the 14th day of June, 1921, the said appellant filed in said cause its motion for rehearing and suggestions in support of motion for rehearing, which said motion and suggestions are in the words and figures following, to-wit:

In the Supreme Court of Missouri.

No. 21819.

ELIZABETH VAN ZANT, Respondent,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Motion for Rehearing.

Comes now the Kansas City Southern Railway Company, appellant herein and moves the Court to grant a rehearing and re-argument in the above entitled cause for the following reasons, to-wit:

1. Because the opinion and judgment of this Court are in conflict with a controlling decision to which the attention of the Court was not called through inadvertence of counsel, said decision being N. Y. Central R. R. Co. vs. Mohney, 252 U. S. 152.

2. Because this Court has overlooked decisions and questions decisive of the case and duly submitted by counsel for appellant, which decisions and questions, if considered and followed by the Court, would necessarily result in a reversal of this case.

(*a*) This Court has overlooked and not referred to or in any way commented on the case of Charleston, etc. Ry. Co. vs. Thompson, 234 U. S. 576, which is directly in point and is controlling on the

case at bar. The same was duly called to the court's attention in appellant's brief, page 20, and the opinion in said case set out in full.

(*b*) This Court has overlooked and in no way referred to the Telegraph cases (so called) which are controlling and conclusive on the case at bar, in that they announce a precisely similar rule, to that for which appellant is contending, to-wit, that inasmuch as Tele-
45 graph companies are under the operation of the Interstate Commerce law liability for failure to properly transmit messages is governed and controlled by Federal and not by State law, although the question of such liability has not been directly legislated upon by Congress in the Interstate Commerce Act or the amendments thereto. Cases so holding are:

Leftridge vs. Union Tel. Co. 277 Mo. 90 l. c. 97-98.
Tel. Co. vs. Lbr. Co. 251 U. S. 27.
Tel. Co. vs. Boegli, 251 U. S. 315 l. c. 317.

These cases were called to this Court's attention in appellant's Points and Authorities II, page 6, and were commented on and quoted from in appellant's brief, pages 12 to 17.

(*c*) This Court has entirely overlooked the question duly raised by appellant, that exactly similar, analogous, and controlling is the opinion of the United States Supreme Court in Prior vs. Williams, 41 Supreme Court Reporter, No. 4, page 36, wherein the United States Supreme Court held that under the Federal Employers' Liability Act, defense of Assumption of Risk was to be measured by Federal and not by State decisions, and in making this holding overruled the Supreme Court of Missouri on the proposition, and announced the applicability of Federal law notwithstanding the Employers' Liability Act does not specifically undertake to legislate on the precise question.

Wherefore, it is respectfully submitted that Motion for Rehearing herein should be granted.

CYRUS CRANE,
RAY BOND,
Attorneys for Appellant.

46 In the Supreme Court of Missouri.

No. 21819.

ELIZABETH (GOODRICH) VAN ZANT, Respondent,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Suggestions in Support of Motion for Rehearing.

I.

This Court in its opinion affirms the judgment in plaintiff's favor in the lower court on the ground that the Interstate Commerce Act,

permitting the issuance of free interstate passes, does not contain legislation with reference to the carrier's liability in connection therewith, and therefore state regulations may still continue. The exact language of this Court on the proposition is as follows:

"Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several States."

Permit us to say with all deference to and respect for the Court that in arriving at this conclusion, this Court has seemingly, at least so far as anything appears in the opinion, entirely ignored the most potent decisions and arguments which would point to a contrary conclusion.

II.

Before proceeding further to call attention to the decisions and questions which this Court has overlooked or omitted in arriv-
47 ing at its conclusion, we wish to call attention to a case which counsel for appellant omitted to cite or call to this court's notice in any of the briefs. A case which in our judgment plainly shows that the Supreme Court of the United States has directly held (in addition to other cases which will be hereafter referred to holding the same thing) that the case as to liability of the railroad company to a passenger making an interstate trip on a free pass, is governed by Federal and not State regulations, to wit, N. Y. Central R. R. Co. vs. Mohney, 252 U. S. 152. Of that case the following is a correct summary:

1. Mohney, a railroad employee riding on an annual pass, was injured in the State of Ohio, where the law is the same as it is in Missouri with reference to the stipulations on the pass, releasing the carrier from liability for negligence—that such stipulations are void.

2. It was found as a matter of fact that Mohney could recover, notwithstanding the stipulations on the pass, for two reasons:

(*a*) Because it was found that he was making an intrastate and not an interstate trip, and therefore the validity of the release depended on the laws of Ohio and were void.

(*b*) Because the defendant railroad company was guilty of willful and wanton negligence, and therefore, of course, the stipulations on the pass were of no effect.

3. The opinion of the Supreme Court points out with extreme care that because the trip was intrastate and not interstate, the provisions of the state law were applicable. The plain inference is, and a reading of the case it seems to us will convince anyone, that all the Court were agreed that if the trip which the plaintiff was making had been

interstate, then the stipulations on the pass would govern, and after showing that the Court was of that opinion, the language of Mr. Justice Day and Mr. Justice Van De Vanter, leaves no room for doubt. They said:

"(We) concur in the result, being of the opinion that Mohney was using the annual pass in an interstate journey, and that
48 to such a use of the pass the Ohio law was inapplicable, but that the releasing clause on the pass would not cover or embrace his injury, because the latter resulted from willful or wanton negligence, as to which such a clause is of no force or effect."

Now we firmly believe that if this Court will carefully read and consider the Mohney case, and in connection with it, Charleston, etc., Ry. Co. vs. Thompson, 234 U. S. 576, it cannot escape the conclusion that the Supreme Court of the United States has already held unmistakably, that a passenger making an interstate trip on a free pass cannot recover for the ordinary negligence of his carrier, when the stipulations on the pass preclude such recovery. (Of course, in the case at bar there is no question of willful and wanton negligence, as we have heretofore pointed out. It was neither pleaded nor proven.)

It therefore follows that this Court is in error in saying as it does in its opinion as follows:

"Whether responsibility for personal injuries sustained by interstate passengers is still subject to the regulations of the several States does not seem to have ever been directly passed upon by the Supreme Court."

Because from the two cases above mentioned, it is perfectly obvious that the question of responsibility of the railroad companies for personal injuries sustained by interstate passengers traveling on free or gratuitous passes, exempting the carrier from liability, has been directly passed upon by the United States Supreme Court, and it held that there can be no recovery under such circumstances.

Take another aspect of the Mohney case. It will be seen from a reading of the opinion that the main proposition discussed and analyzed by the United States Supreme Court was whether or not, under the facts, Mohney was making an intra or an interstate trip. This, of course, was for the purpose of determining whether or not the laws of Ohio were applicable. If, as plaintiff in this case contends, and as this Court has announced in its opinion, state regulation remained whether the trip was inter or intrastate, then
49 the United States Supreme Court was doing a foolish and unnecessary thing in attempting to analyze and determine what the character of the trip was, whether inter or intrastate. If state regulation still remained, the result would have been the same in either event—the law of Ohio would have applied and the stipulations held to be invalid.

Does not this show, beyond any possibility of question, that the entire court were holding that on an interstate trip, Federal law applied, and on an intrastate trip, state law applied? Can any reasoning mind reach any other conclusion? It seems to us impossible.

III.

Railway Company vs. Thompson, 234 U. S. 576.

We are unable to undertstand how this Court, ordinarily so careful in the consideration of all the legitimate questions raised on appeal, could have overlooked, not mentioned, nor in any way referred to the above case—especially in view of the fact that it decides the precise question involved in the case at bar. It was duly called to this Court's attention in the Points and Authorities in appellant's brief, and it was quoted in its entirety in the brief on pages 20, 21 and 22. In the Thompson case the facts are exactly the same as in this case. The plaintiff, Lizzie Thompson, a member of the family of an employee, was traveling on an interstate pass, making an interstate trip. She was injured by the negligence of the defendant railroad company. It was held that because of the stipulations exempting the carrier from liability on the back of the pass, that she could not recover.

We most respectfully insist that a case on all fours decided by the Supreme Court of the United States should not be ignored by this Court, where the whole question to be determined is essentially one of Federal law.

50 Let us look further at the Thompson case. The "main question" as stated by the Supreme Court of the United States itself in that case was whether or not the pass was a free or gratuitous pass. The contention of the injured plaintiff was that it was not a free pass because it was issued really as part payment for the services of an employee. This contention was rejected by the Supreme Court and it was held to be exactly what it was called—a free pass.

Just as in the case at bar, so in the Thompson case, the pass was issued under the provisions of the Interstate Commerce Act.

Now the Supreme Court of the United States, after finding the pass was free, then held that there was no question as to the validity of the stipulations exempting the railroad company from liability, using this language:

"As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals, as we have stated, and is established by the decisions of this Court. Northern Pacific Ry. Co. vs. Adams, 192 U. S. 440; Boering v. Chesapeake Beach Ry. Co., 193 U. S. 442. Judgment reversed."

The only answer which respondent has ever made to the Thompson case, which is exactly in point here and decisive of the case, is that the injury in the Thompson case occurred in the State of Georgia, where, as they claim, the limitations on liability under these circumstances are different from Missouri, not held to be invalid.

But we respectfully and earnestly insist that this distinction is one resting wholly in the imagination of counsel. The United States Supreme Court did not rest its opinion on any such proposition, and made no reference whatever to the state law in holding that the stipu-

lations were valid. It announced in the simplest and baldest terms that if the pass was once found to be a free pass, then there could be no question of the validity of the stipulations against liability. It is therefore absolutely unwarranted in attempting to distinguish the Thompson case from the case at bar.

51 Without going into an analysis of the multitude of cases wherein analagous propositions have arisen under many and different circumstances, this Court must certainly be aware of the fact that the interpretation of the Interstate Commerce Act by the United States Supreme Court has always and invariably been to give the Act and all of its provisions a uniform operation over the entire United States. That is to say, in questions of liability arising on contracts made under the Interstate Commerce Act, it has been held that there could not be and must not be one rule of liability in one jurisdiction and another and different one in another jurisdiction, but that the Act and all matters coming under it must be uniformly applied, and the same result reached everywhere. We know of no exception to this interpretation of the Act. Now, if this Court is correct in the present opinion, then it would follow that to a passenger making an interstate trip on a free pass, exempting the railroad company from liability, recovery would depend wholly upon the question of where the accident happened. If it happened in one State, then there might be liability and in another State not. There is no sanction for making such a claim or reaching such a result, if we adhere to and follow the unbroken rule of the Supreme Court has heretofore established by its decisions—that is, uniformity.

IV.

May we inquire in the friendliest spirit why this Court does or why it should cling so tenaciously to state regulation of interstate matters, when it has been so completely demonstrated by past experience and especially by the uniform attitude of the United States Supreme Court that this position is untenable.

These two prominent illustrations (both of which were called to the attention of the Court in our original brief and which have been entirely ignored by this Court, probably due to our inability to present them with sufficient clarity or force), to-wit:

52 1. The Telegraph Cases.

This Court in Leftridge vs. W. U. Tel. Co. 277 Mo. 90 had pressed upon its attention this same proposition in another form. In that case it was claimed that there was no regulation, that is no legislation, governing the liability of the Telegraph Companies' failure to deliver messages, and therefore the matter was left to the control of the States. This Court indicated very clearly that it would have been inclined to take that view of the matter, and said in its opinion:

"There is plausibility in the argument, for it is not to be presumed that Congress would withdraw from the State the right to

protect persons and property within its limits, otherwise than by the expression of a clear intent to that effect."

But this Court was mindful of its duty to follow, on a question of this character, the decisions of the Supreme Court of the United States, and therefore was obliged to say, although apparently reluctantly, as follows:

"This argument in its application to the case has been met by the Supreme Court of the United States in the case of W. U. Tel. Co. vs. Brown 234 U. S. 542."

Therefore, this Court was forced to and did hold that state regulation no longer had any place in the liability of Telegraph Companies for failure to transmit messages, and State Statutes could not be made applicable.

At this point permit us to again urge on this Court the force of all these Telegraph Cases, which were argued at length in our brief on pages 12, 13, 14, 15, 16 and 17, but which for some reason have been entirely ignored by this Court in arriving at its conclusion. We cannot but believe that by direct analogy they are clearly in point on the question at issue. When the sender of a telegraph message sues for its non-delivery, he is suing on a contract. There is no where in the Acts of Congress any legislation as to the liability under the contract on which he is suing. There is no attempt
53 to determine what penalties shall be imposed for failure to transmit a message, but nevertheless the United States Supreme Court holds that the entire matter is under the operation of Federal and not State law, and this Court has recognized and bowed to that holding. So in the case at bar, the defense of the railroad company is based on the contract which it issued, to-wit, a pass with certain stipulations thereon. In other words, it is using the contract as a defense and not the basis of a cause of action, but the same principle applies, to-wit, that the contract in issue is governed by the same principle, that is that it is to be controlled and interpreted by Federal not State law. Therefore, it seems to us that the analogy is complete and that the Telegraph Cases would be controlling in the result that must be arrived at in this case, even though there had been no holding of United States Supreme Court in regard to passes.

2. Assumption of Risk under Federal Employers' Liability Act.

An examination of that Act will show that the only reference in it to the defense of Assumption of Risk is that such defense is not open to the defendant when the action is based on the violation of safety appliance acts, etc. Aside from this, there is no legislation with regard to defense of Assumption of Risk at all. This Court again on that question took the position that where the defendant pleaded Assumption of Risk, that defense and position of law was to be interpreted by the decisions of the state in which the cause of action arose, and plainly declared its determination to stand on

the right of the state court to apply the doctrine in the light of its own decisions in Holloway vs. Ry. 276 Mo. 490; Fish vs. R. R. 263 Mo. 106; Williams vs. Prior 200 S. W. 53. But when the last named case reached the Supreme Court of the United States, it held that the doctrine of Assumption of Risk was to be interpreted and applied by Federal and not State decisions.

54 It seems to us that the Supreme Court of the United States has made itself perfectly clear on this whole matter in the very concise statement found in Tel. Co. vs. Lbr. Co. 251 U. S. 27 where the reason for applying Federal rules in the Telegraph Cases was rested "upon the necessary effect of the general provisions of the Act, bringing Telegraph Companies under the control of the Interstate Commerce Act. The condition as to continuance of state power here made is to be adversely foreclosed."

With these illustrations before it, we cannot understand why this Court should longer cling to the doctrine of the applicability of state regulation. The final guide in all these matters must be the decisions of the United States Supreme Court. Are not the foregoing illustrations (which have not been referred to in this Court's present opinion) sufficient to clearly demonstrate that this Court is occupying an untenable position? It seems to us, therefore, that a rehearing should be granted and full consideration given by this Court to those decisions of the United States Supreme Court which we firmly believe must lead to a conclusion opposite of what has been reached by this Court. In all fairness we think that this Court ought not let stand an opinion which fails to touch differentiate, comment on or quote from decisions of the Court by which it must be finally guided, when those decisions are directly in point, touch the precise question at issue, and are plain in their enunciations. It has always been a matter of satisfaction to the bar of this State to know that when they have seriously and earnestly presented a question to this Court and buttressed it by decisions which they believe to be in point and controlling, they will know when the case is ended just where this Court stands, and its reasons for the position taken. In the present case we cannot feel that way about the opinion rendered, because it totally omits mention of the most applicable decisions rendered by the Supreme Court of the United States on the question.

Wherefore, it is prayed that a rehearing be granted.

Respectfully submitted,

CYRUS CRANE,
RAY BOND,
Attys. for Appellant.

55 And thereafter, and on the 24th day of June, 1921, the respondent's Suggestions in Opposition to Appellant's motion for Rehearing was filed in said cause, which said suggestions are in the words and figures following:

In the Supreme Court of Missouri.

No. 21819.

ELIZABETH VAN ZANT, Respondent,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Respondent's Suggestions in Opposition to Appellant's Motion for Rehearing.

The grounds set out in the motion for rehearing and in the suggestions in support thereof all relate to questions and authorities that have been presented fully by appellant to this court, both in brief and in oral argument, with the one exception of the citation of the case in the first paragraph of the motion for rehearing, which is discussed in the second paragraph of appellant's suggestions in support of this motion, viz.:

New York Central Ry. Co. v. Mohney, 252 U. S. 152.

The points decided, or the points in judgment in that case, have no similarity to the present case, and whatever may have been said by the two judges in the minority opinion in that case is admittedly obiter, as no such question was before the court, and the court, in the majority opinion, l. c. 158, removes entirely from the decision in the case before this court the question as to what would have been the decision of the court had it been an interstate pass.

The expression of the majority opinion is as follows:

"The evidence in the record as to the terms and conditions upon which the pass was issued to the plaintiff is so meager that, since it is not necessary to a decision of the case, we need not and do not consider the extent to which the case of Charleston R. R. Co. v. Thompson, 234 U. S. 576, is applicable to an employee using a pass furnished to him seemingly s a necessary incident to his employment."

The vital question before this court, decided in the opinion in the Van Zant case, to-wit:

Has Congress, by the Hepburn Act, regulated the validity or invalidity of the release on the back of the free pass in this case to the explusion of the laws of this state?

was not considered in the case of Railway Company vs. Mohney, 252 U. S. 152. Neither was the other vital question in this case, that in a proper state of facts relating to an interstate pass, where the passenger was injured through the negligence of the carrier while traveling on said pass and said action was brought and tried in a

Federal court nisi, the United States courts apply their own rules as to whether a contract for a release on the back of the pass was a defense to such action and not void as against public policy; while in an action tried in the state courts, the state courts apply their own rules as to the validity or invalidity of such release, which will not be interfered with by the United States court when taken from the state court on writ of error to that court.

Examining carefully the Mohney case, which had already been published in the advance sheets of the Supreme Court Decisions when this case was first briefed, and in the printed volume when the case was argued in this court, it will be seen that no question relating to interstate commerce or an interstate pass was in the record of that case. The case went to the Supreme Court of the United States on writ of error from the state Court of Appeals of the state of Ohio.

252 U. S., l. c. 154-155.

The Court of Appeals held that Mohney was an intrastate passenger when injured, and by a divided court affirmed the judgment on two grounds, to-wit: (1) that the pass was issued to Mohney as part consideration of his employment, and, (2) on the ground (all judges concurring) that the court was clearly of the opinion that the
57 negligence in this case, under the evidence, was willful and wanton. That part of the opinion of the state Court of Appeals of Ohio, upon which the case was sent to the Supreme Court of the United States, namely, that the pass was not a free pass, was in direct conflict with the opinion of the United States Supreme Court in the Thompson case. The opinion of the Supreme Court in the Mohney case disposed of these several supposed grounds of conflict and removed them from the record in this case entirely by deciding that the pass issued to Mohney was not an interstate pass, but an intrastate pass.

This first holding entirely removed and made it unnecessary to discuss any other question, even according to the theory of appellant in this case, because it is admitted by respondent in the Van Zant case, now before this court, that the pass was a free pass. It therefore follows that the opinion of the court in the Mohney case could not, under any consideration, be held an authority in the Van Zant case.

The Supreme Court in the Mohney case, 252 U. S., l. c. 156-157, discusses the character of the pass in the following words:

"But that contract, in terms, was good only between Airline Junction and Collingwood over a line of track wholly within Ohio."

By what process of reasoning appellant's attorneys can build an argument in support of their theory in the case here before this court from a decision based on an admitted intrastate pass is not apparent.

The court, in the Mohney case, further decided that the decision of the state court could be upheld on the ground that the negligence complained of was gross negligence. The Supreme Court had no authority nor power to decide, on the record as it appeared before the

court in that case, the issues in a case such as is presented in the case now before this court, and any expression of opinion outside of this record is mere obiter.

58 In the Van Zant case it is admitted that the pass was a free pass. The case was tried in the state court in accordance with the decisions as to public policy and the rules of negligence of the state of Missouri. The principal point of discussion, both in brief and orally before the court, was as to whether Congress has regulated the invalidity of the release on the back of the pass to the exclusion of the law of the state where the injury occurred. As above stated, this identical question was not presented to the Supreme Court of the United States in either the case of Railroad Company v. Thompson or the Mohney case. It could not possibly have been decided, because the facts were not present upon which to base such a question.

In this connection we ask the court to note the following decisions as to the binding effect of decisions of the Supreme Court relating to questions before the court which were not urged in a former case. In the case of New v. Oklahoma, 195 U. S., l. c. 256, the Supreme Court of the United States held that the Federal Supreme Court will not consider decisions on the question of its jurisdiction in a prior case in which jurisdiction was entertained without any suggestion as to the want of it.

The pass in the Ohio case being an intrastate pass and not an interstate pass, the decision of the court in that case must be considered as to the point in judgment as applying only to cases involving questions as to intrastate passes, and anything said by the court in a case of this character relating to an interstate pass would be obiter dicta, and comes under the rule announced by the Supreme Court of the United States in the case of McCormick Harvesting Machine Co. v. Aultman, 169 U. S., l. c. 611, in which the court held that the expression of opinion on a point not decided by the court is a mere dictum lacking the force of a judicial decision. Also the case of Bardes v. Bank, 178 U. S., l. c. 534, in which the court held that an opinion given in a decision can not be relied upon as bind-

59 ing authority unless the case called for its expression.

Appellant's attorneys, in their suggestions in support of their motion, entirely overlooking this rule, have this remarkable suggestion to offer, namely:

"Because from the two cases above mentioned (referring to the Mohney case and the Thompson case) it is perfectly obvious that the question of responsibility of the railroad companies for personal injuries sustained by interstate passengers traveling on free or gratuitous passes, exempting the carrier from liability, has been directly passed upon by the United States Supreme Court, and it held that there can be no recovery under such circumstances."

A more absurd statement could not have been made. If it means anything, it is that you can take two decisions of the Supreme Court of the United States, based on entirely different statements of facts, and select from such decisions such facts as fit your theory and also

such expressions of the court as fit your theory, and make them an authority for facts in another case in which the facts are entirely different from the facts in either of the cases considered by the court. To illustrate: in the decision in the Thompson case, 234 U. S. 578, the only point of difference between the Court of Appeals of Georgia and the holding in the United States Supreme Court was as to whether the pass was a free pass. In the Georgia case the pass was an admittedly interstate pass. In the Ohio case the pass was both a free pass and an intrastate pass. In the Ohio case the question of gross negligence was a controlling feature of the case. In the Georgia case—Railroad Company vs. Thompson—gross negligence was not an issue. So we find the appellant undertaking, as he says, to piece these two cases together, and from intimations in the cases by different judges he can pick out enough to show from these words and intimations that if the court had had the instant case before it, it would have decided the same as contended for by appellant.

60 Appellant has not shown to this court any case, either state or Federal, where the question on the state of facts as shown in the Van Zant case has been decided as contended for by appellant in its brief. Neither has it shown any decisions of any Federal court holding that Congress, in the passage of the Hepburn Act, has taken over from the state the whole or any part of the field of liability for injuries to passengers riding on a free pass. This question has never been presented to the Supreme Court of the United States on a state of facts as in the instant case, and the Hepburn Act, in that respect, has never been discussed by that court.

We have heretofore pointed out in our original brief the fact that the decisions of the Federal court as to liability in cases such as the present one, and as to what law shall control, are governed by the local law of the forum in which the case is tried nisi.

At the risk of being tedious, we again point out that where the case is tried nisi in a state forum and goes by way of writ of error to the Federal court, the Federal court applies the state law as to liability, while on the other hand, where the trial nisi is in the Federal court, that court applies its own interpretation of the common law.

Appellant urges that the question of liability here is dependent upon the provisions of the Hepburn Act, which it quotes. It is significant that the Act contains not one single provision, either as to the question of liability for negligent injury to a passenger riding on a free pass, or as to the validity of a release on the back of the pass. It simply provides, as pointed out by the opinion in this case, what shall constitute a free pass, to whom the same may be issued, and the penalty for issuing a pass to a person not entitled thereto.

61 That the Hepburn Act has nothing to do with the question of liability for negligent injury to a passenger riding on a free pass is clearly demonstrated by the decisions of the United States Supreme Court relied upon by appellant. The case of

Northern Pacific Ry. Co. v. Adams, 192 U. S. 440,

cited by appellant, was a case tried nisi in the Federal court, and, as stated above, under such circumstances the Federal court applies its own interpretation of the common law as to the liability for injuries to a person riding on a free pass where there is a stipulation exempting the carrier from liability for its negligence. The facts upon which this case was decided were of date November 13, 1898. The case went to the Supreme Court of the United States and the decision was handed down some two years or more before the Hepburn Act was passed in 1906, and therefore was not and could not have been based upon the provisions of that Act, and this decision, also, was on the defense interposed by the railroad company. The same is true of the case of

Boering v. Chespeake Beach Ry. Co., 193 U. S. 442,

which was decided two years before the Hepburn Act was passed. It is clear that the Hepburn Act could have no influence on the two foregoing decisions, for the reason that it was not placed on the statute books until some two years after the rule upon which appellant in this case depends for its defense was announced as the settled policy of the United States Supreme Court. The same is true of the case of

Baltimore & Ohio Southwestern Ry. Co. vs. Voight, 176 U. S. 498.

which was decided in 1900, or six years before the adoption of the Hepburn Act. This last case was tried nisi in the Federal court for the Southern District of Ohio and reported in 79 Fed. 561.

62 It will be noted that all three of these cases were tried nisi in the Federal court, and the liability was therefore determined by applying the Federal interpretation of the common law as to the validity of a contract limiting the liability of a carrier for a negligent injury to a passenger riding on a free pass.

This same rule has been applied by the Federal courts as a defense in cases arising originally in the Federal courts to the same extent and in the same way since the passage of the Hepburn Act as prior thereto, as witness

Buetler v. Grand Trunk Ry. Co., 224 U. S. 85,

in which the court said:

"So it has been decided in cases tried in the United States court we must follow our own understanding of the common law when no settled rule of property intervenes."

Also to the same effect is

Southern Pac. R. R. Co. v. Schuyler, 227 U. S., l. c. 612.
Wiley v. Grand Trunk Ry. Co., 227 Fed., l. c. 129.

These decisions and the respective dates upon which they were handed down show conclusively that the Federal courts, and especially the Supreme Court of the United States, have never held or intimated that the Hepburn Act, as it relates to free passes, changed the law with respect to the defense of a carrier in an action for negligence where the release on the back of the pass was pleaded as such defense. This certainly ought to dispose of all the suggestions and objections of appellant against the decision of the court in this case, as these objections are based entirely by appellant's attorneys on their construction and contention that the Hepburn Act does change the law. Overlooking these decisions and
63 their history and meaning has caused appellant's attorneys to misread the opinion of the court in the case of

Ry. Co. v. Thompson, 234 U. S. 576,

as witness l. c. 578, where the court says:

"As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals (of the state of Georgia), as we have stated, and is established by the decisions of this court (not by the provisions of the Hepburn Act). Ry. Co. v. Adams, 192 U. S. 440, and Boering v. Chespeake Beach R. R. Co., 193 U. S. 442."

We confidently believe that a careful reading of the history of these decisions in connection with the Hepburn Act will convince even appellant's attorneys that this court correctly announced the law in the last paragraph of the opinion, where it is said:

"Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several States."

The remainder of appellant's brief is based, as it says, on the Hepburn Act as a defense. The Hepburn Act says nothing about defenses any more than about actions, and the above decisions, their holdings and the time the decisions were made, demonstrate that the remaining part of appellant's suggestions and argument have nothing to do with the case before this court, and they also dispose of the surprise of appellant's attorneys that the court did not mention the Thompson case in its opinion, as the entire opinion of the court and the reasons given therefor are such as to eliminate the Thompson case from being applicable in any sense to the record in the instant case.

64 Appellant again urges, as it did in its brief and on the hearing of this case, that the cases cited by appellant based on the Federal Employer's Liability Act, and a line of telegraph cases, are controlling in appellant's favor in this case.

These matters have been gone over and proper distinctions made in the original briefs filed in this case and on oral argument, and it has been demonstrated that these lines of cases have no application to the question before the court in this case. Indeed, as to the cases arising under the Federal Employer's Liability Act, the very subject of that act shows that Congress legislated as to the liability and the remedy, and in fact took over the whole subject. In addition to the point made by respondent in the original brief in this case, pointing out the distinction of the telegraph cases, we submit the following further distinctions:

Western Union v. Brown, 234 U. S. 542:

Suit for mental anguish for failure to deliver message in District of Columbia, the law giving the right being of South Carolina.

Held: As failure to deliver was in another jurisdiction, the tort was committed there, and the Carolina law imposing damages would be extra-territorial.

Also attempts to regulate the conduct of the telegraph company throughout the entire distance, and therefore interferes with interstate commerce, over which Congress has taken exclusive control.

Here the tort was in Missouri and it was Missouri law applied.

Leftridge v. Western Union, 227 Mo. l. c. 94:

Suit (tort) for failure to transmit and use due diligence to deliver in another state a message.

Opinion: "It would be difficult to imagine a cleaner illustration not only of the interstate character of the transaction, but also the interstate character of the control assumed by this state, in which the only act necessarily performed is the harmless one of receiving the message and payment for its transmission."

65 In other words, the tort was committed in another state, and the Missouri law would be extra-territorial.

In the present case the tort was committed in Missouri, and the Missouri law applies only to the relationship between the carrier and the passenger within the borders of the state.

Further quoting, l. c. 94:

"The act or failure to act which incurs the penalty is to be performed in another State."

The distinction is pointed out by this court.

Donovan case:

Congress has legislated on the liability and the remedy, has specified that rates may be classified, has compelled the issuing of a bill of lading and has expressly provided against side contractor.

There are many things in appellant's suggestions and arguments on this motion for rehearing which attorneys for respondent are

forced to confess that they do not understand and are unable to determine, after careful consideration, their purpose as applied to the issue raised by this motion. Such remarks as the following on page 1 of appellant's suggestions:

"* * * this Court has seemingly, at least so far as anything appears in the opinion, entirely ignored the most potent decisions and arguments which would point to a contrary conclusion."

Also the following in the last paragraph under point II:

"Can any reasoning mind reach any other conclusion? It seems to us impossible."

Again, the beginning of the first paragraph under point III of appellant's suggestions:

66 "We are unable to understand how this Court * * * could have overlooked, not mentioned, nor in any way referred to the above case—especially in view of the fact that it decides the precise question involved in the case at bar."

Further, under this same point:

"We most respectfully insist that a case on all fours decided by the Supreme Court of the United States should not be ignored by this Court, where the whole question to be determined is essentially one of Federal law."

And further, under the same point:

"But we respectfully and earnestly insist that this distinction is one resting wholly in the imagination of counsel."

Under point IV:

"May we inquire in the friendliest spirit why this Court does or why it should cling so tenaciously to state regulation of interstate matters, when it has been so completely demonstrated by past experience and especially by the uniform attitude of the United States Supreme Court that this position is untenable." (A lecture.)

On the last page of the suggestions:

"In all fairness we think that this Court ought not let stand an opinion which fails to touch, differentiate, comment on or quote from decisions of the Court by which it must be finally guided, when those decisions are directly in point, touch the precise question at issue, and are plain in their enunciations."

and divers other generalizations, preachments and oratorical exclamations.

No reason can be given for appellant's contention that the Hepburn Act in any way affects the validity of the release on the back of the free pass in this case. Doubtless counsel for appellant
67 hope that, on account of the present tendency to concentrate all powers of government,—legislative, executive and judicial,—at Washington, and the further tendency of the Federal courts to be caught up by this centralizing influence, the Supreme Court of the United States might overlook the reasoning and force of the opinion in the instant case.

Counsel for respondent regret to be forced to admit that this centralizing influence has obtained in this country to such an extent that the field of jurisdiction of the Federal courts has broadened until the state courts have, to a large extent, been stripped of their jurisdictional rights to pass upon questions in cases where it is doubtful if Congress ever meant that the Federal government should take over the questions involved.

Notwithstanding this, we do not believe that the Supreme Court of the United States will, in construing a case like this, hold that the Hepburn Act has been extended to a subject of jurisdiction which is neither mentioned nor intimated in the act, and which subject this court, as above indicated, has interpreted the same way both before and after the passage of the Hepburn Act.

And notwithstanding this centralizing influence, we believe it is the plain duty of this court to continue, as it has in the past and as it has in this case, to decide these questions according to the law and the facts as understood by the court, excepting only those cases where the Supreme Court of the United States, in a proper case which is binding upon this Court, has declared otherwise.

If there is to be any judicial amendment to the Hepburn Act, as suggested by appellant's attorneys, it is yet to be made by the
68 Supreme Court of the United States; but if such amendment must be made judicially, then let this judicial legislation be by the Supreme Court of the United States, and not by the Supreme Court of Missouri.

Respectfully submitted,

F. H. LEE,
KENNEY & KENNEY,
NORMAN A. COX,
HUGH DABBS,
Attorneys for Respondent.

69 And thereafter, and on the 11th day of July, 1921, the following further proceedings were had and entered of record in said cause, to wit:

In the Supreme Court of Missouri, Division No. 1, April Term, 1921.

No. 21819.

ELIZABETH (GOODRICH) VAN ZANT, Respondent,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Now at this day the Court having considered and fully understood the motion heretofore filed by the said appellant for a rehearing herein, doth order that said motion be, and the same is hereby overruled.

STATE OF MISSOURI, *set:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the cause of Elizabeth (Goodrich) Van Zant, Respondent, vs. The Kansas City Southern Railway Company, Appellant, No. 21819, as fully as the same appear of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of said Supreme Court, at my office in the City of Jefferson, State aforesaid, this 20th day of July, 1921.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court,
of the State of Missouri.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Being informed that there is now pending before you a suit in which The Kansas City Southern Railway Company is appellant, and Elizabeth (Goodrich) Van Zant is respondent, No. 21819, which suit was removed into the said Supreme Court by virtue of an appeal from the Circuit Court of Casper County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,418. Supreme Court of the United States, No. 463, October Term, 1921. The Kansas City Southern Railway Company vs. Elizabeth Van Zant. Writ of Certiorari.

In the Supreme Court of the United States.

No. 463.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Petitioner,

vs.

ELIZABETH VAN ZANT, Respondent.

Certiorari.

It is hereby stipulated by and between The Kansas City Southern Railway Company, petitioner in the above entitled cause, and Elizabeth Van Zant, respondent therein, that the transcript of record certified by the Honorable J. D. Allen, Clerk of the Supreme Court of the State of Missouri, on file in the office of the Clerk of the Supreme Court of the United States, in the above entitled cause, can be taken as and for a return to the writ of certiorari issued by the Supreme

Court of the United States, and other and further return to said writ is hereby waived.

CYRUS CRANE,
A. F. SMITH,
Attorneys for The Kansas City Southern Railway Company, Petitioner.
C. H. MONTGOMERY,
NORMAN COX,
HUGH DABBS,
Attorneys for Elizabeth Van Zant, Respondent.

STATE OF MISSOURI, *Set:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full, true and complete transcript of the stipulation filed in my office on the 22nd day of November, 1921, in the above-entitled cause, as fully as the same appears on file in my office; and I herewith transmit the said transcript of said stipulation to the Honorable Supreme Court of the United States as my return to the within writ of certiorari.

In testimony whereof, I have hereunto set my hand and affixed the official seal of said Supreme Court of the State of Missouri, at my office in the City of Jefferson, State aforesaid, this 22nd day of November, 1921.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

[Endorsed:] 463/28,418. No. 28,418. In the Supreme Court of the United States. The Kansas City Southern Railway Company, Appellant, vs. Elizabeth Van Zant, Respondent. Return to Writ of Certiorari.

[Endorsed:] File No. 28,418. Supreme Court U. S., October Term, 1921. Term No. 463. Kansas City Sou. Ry. Co., App't, vs. Elizabeth Van Zant. Writ of certiorari and return. Filed Nov. 25, 1921.

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,

vs.

ELIZABETH VAN ZANT, *Respondent*.

No. [redacted]

Motion for Writ of Certiorari.

Petition for Writ of Certiorari.

Brief in Support.

Owen Gaffy,

A. P. Bryan,

Attorneys for Petitioner.

P. H. Moore,

Ray Bond,

Of Counsel.

—IN THE—

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,
vs.
ELIZABETH VAN ZANT, *Respondent*.

No.

MOTION FOR WRIT OF CERTIORARI

Now comes petitioner above named by its attorneys and moves this Honorable Court that by certiorari or other proper process, directed to the Honorable Judges of the Supreme Court of Missouri, it require the said Supreme Court aforesaid to certify to this Honorable Court for review and determination, a certain cause lately pending in said Supreme Court of Missouri wherein this petitioner was appellant and Elizabeth Van Zant was respondent, and for that purpose the said petitioner tenders herewith its petition and brief with a certified copy of the entire record of this cause in the said Supreme Court of Missouri, together with certified copy of the Record of Proceedings had, for the purpose of review of the same in the said Supreme Court.

Cyrus Crane
A. J. Smith
Attorneys for Petitioner.

—IN THE—

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,
vs.
ELIZABETH VAN ZANT, *Respondent*.
} No.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully petitions for a review by your Honorable Court of the proceedings of the Supreme Court of Missouri in the case of *Elizabeth Van Zant, respondent, vs. The Kansas City Southern Railway Company, appellant,* wherein that Court rendered a judgment against your petitioner, and which by due process has been made final by reason of the action of said Supreme Court of Missouri in refusing to grant rehearing thereof.

Your petitioner, who was the defendant in the trial court and appellant in said Supreme Court of Missouri, believes that the aforesaid judgment of said Supreme Court of Missouri is erroneous and that this Honorable Court should require that the said case be certified to it for its review and determination in

conformity with the provisions of the Act of Congress in such cases made and provided, for the following reasons, to-wit:

The action was brought by Elizabeth Van Zant, the respondent, a dependent member of the family of an employe of your petitioner, for damages for alleged personal injuries received while traveling upon a free interstate pass, issued to her by your petitioner from Pittsburg, in the state of Kansas, to Howe, in the State of Oklahoma, said pass having thereon and as a part of the same, the following conditions:

> "Good for stop-over at will on application to conductor.
>
> This pass is not transferable, must be signed in ink by the holder thereof, and the person accepting and using it thereby assumes all risk of accident and damage to person and baggage.
>
> Forfeited if presented by other than person named and may be revoked without notice.
>
> The above conditions are hereby agreed to. I also represent and declare that I am not prohibited by Federal and State laws from receiving free transportation and this pass will be lawfully used."

The same were duly signed by respondent. The trial court, being the Circuit Court of Jasper County, Missouri, rendered judgment in favor or respondent against your petitioner in the sum of Eight Thousand ($8,000.00) Dollars and denied the motion of petitioner for a new trial. The Supreme Court of Missouri affirmed said judgment and erred in so doing for the following reasons, to-wit:

1. The testimony showed, without contradiction, that the respondent, Elizabeth Van Zant, was upon an interstate journey; was traveling on a free interstate

pass; that said pass contained the stipulations above set out, and the same were agreed to by respondent.

2. There was no claim in the petition of the plaintiff, Elizabeth Van Zant, nor was there any evidence that the defendant below, The Kansas City Southern Railway Company, was guilty of wanton or willful negligence.

3. On such evidence and showing the judgment in the trial court should have been rendered for this petitioner.

4. The motion of petitioner for new trial should have been granted for the reasons therein set forth.

5. Both the trial court and the Supreme Court of Missouri erred in holding that the conditions on the back of the pass were to be governed and controlled by the State instead of Federal law.

6. Under Federal law, and decisions, and particularly the decisions of this court, the stipulations or conditions on the back of said pass were valid, binding and constituted a complete defense to the action, and the trial court and the Supreme Court of Missouri erred in not so holding.

7. The said judgment is repugnant to and in conflict with the laws of the United States, and especially the Acts of Congress of the United States, approved February 4, 1887, and Acts amendatory thereof, known as Interstate Commerce Laws.

8. Said judgment is repugnant to, and in conflict with, the Constitution of the United States, and especially Article 1, Section 8, Clauses 3 and 18 thereof, to-wit:

> "The Congress shall have power * * * *
> Clause 3. To regulate commerce with foreign

nations, and among the several states, and with the Indian Tribes.

Clause 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or office thereof."

9. Said judgment is repugnant to, and in conflict with Federal legislation and the common law rules as accepted and applied, in Federal tribunals.

10. Said judgment is repugnant to, and in conflict with the Constitution, to-wit:

Amendments, Article V:

" * * * Nor shall any State deprive any person of life, liberty, or property, without due process of law."

The aforesaid judgment is in derogation of, and against the aforesaid title, right, privilege and immunity especially set up and claimed under the aforesaid Constitution, statute and authority.

In the trial court judgment was rendered for respondent. That judgment was affirmed by the Supreme Court of Missouri, and the motion filed by petitioner in said Supreme Court of Missouri petitioning for a rehearing was overruled, on the 11th day of July, 1921, and thereupon on said date, said judgment became a final one.

Wherefore, your petitioner respectfully prays that writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of Missouri, commanding said Court to certify and send to this Court, on the day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Supreme Court of Missouri in

the said case threin entitled, Elizabeth Van Zant, respondent, vs. The Kansas City Southern Railway Company, appellant, No. 21,819, to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the said judgment of the Supreme Court of Missouri and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

Geo. Crane
Arthur F. Smith
Attorneys for Petitioner.

State of Missouri, County of Jackson, ss:

A. F. Smith, of lawful age, being duly sworn, says that he is one of the counsel for and agent of The Kansas City Southern Railway Company, petitioner above named; that he assisted in preparing the foregoing petition and that the allegations thereof are true as he verily believes.

Arthur F. Smith

Subscribed and sworn to before me this 8th day of August, 1921.

M L Cullers
Notary Public, within and for Jackson County, Missouri.

My commission expires January 23, 1923

BRIEF FOR PETITIONER.

STATEMENT.

The facts are simple and practically undisputed. The respondent, Elizabeth Van Zant, together with her son, John M. Goodrich, constituted a family. The son was employed by the petitioner and from his wages supported his mother. Upon the request of the son, the railway company issued a free interstate pass to Mrs. Van Zant, good from Pittsburg, Kansas, to Howe, Oklahoma. This pass carried conditions on the back, (set out in full in the foregoing petition) which were assented to by Mrs. Van Zant by signing her name thereunder. Under these conditions she assumed all risk of accident and damage to person and baggage, and thereby released the company from liability therefor.

While making an *inter*state trip on this pass, she claims to have received injuries at a point in the State of Missouri, by falling from her seat into the aisle of the car, by reason of the jarring or jolting of the train, due apparently (although not certainly) to some derailment or wreck. There was no claim in the petition, and no evidence of willful or wanton negligence on the part of the railroad company.

Under the law of the state of Kansas where the pass was issued and the State of Missouri where the accident occurred, the conditions on the back of the pass are held to be void as against public policy. Under the decisions of the United States Supreme Court such stipulations are valid and constitute a complete defense.

The respondent had judgment for Eight Thousand ($8,000.00) Dollars in the trial court, which judg-

ment was affirmed in the Supreme Court of Missouri, and has now become final. The judgment was rendered on the theory that State instead of Federal law governed the conditions or stipulations of the pass.

THE FEDERAL QUESTION INVOLVED

Stated as simply as possible, the Federal question involved is, —Are the stipulations, exempting the carrier from liability, on a *free inter*state pass, issued under the provisions of the Hepburn Act of June 29, 1906, to be governed and controlled by Federal law and Federal decisions, or by the law of the state in which the passenger receives an injury while making an interstate trip on such pass?

It is the contention of the petitioner that the liability of the carrier under such circumstances is to be determined by Federal decisions, and that this Court has already held that such stipulations are valid.

> *Charleston, etc. Ry. Co.* v. *Thompson*, 234 U. S. 576.

The Missouri Supreme Court in its opinion plainly shows that a Federal question is involved. That Court said in its opinion:

> "Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, *therefore, these matters remain the subject of regulation by the several States.*" (Italics ours.)

If the petitioner is correct in its contention, then it was denied an immunity guaranteed it by the Con-

stitution and by Federal law. In any event this Court has never yet held that the "validity of stipulations or conditions" annexed to free interstate passes exempting the carrier from liability, still remain "the subject of regulation by the several States" as announced by the Supreme Court of Missouri.

The question involved affects the rights of thousands of members of families of employes of the carriers, and of the carriers themselves, and should not be left to uncertainty. For these reasons, it seems to us obligatory on this Court to take jurisdiction.

THE RULE OF THE FEDERAL DECISIONS GOVERNS

Before the Constitutional enactment relating to the issuance of free interstate passes by carriers, it had been well settled in this Court, as a matter of common-law interpretation, that stipulations on free passes exempting the carriers from liability, were valid and binding against the person receiving and using such pass and thereby assenting to said conditions.

U. P. Ry. Co. v. *Adams*, 192 U. S., 440;
Boering v. *Chesapeake, etc. Ry. Co.*, 193 U. S. 442.

In the Adams case, Mr. Justice Brewer, delivering the opinion of the court, said, l. c. 453:

> "The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger,

> he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege can not repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby."

The *Boering* case followed, adopted and approved the rule previously laid down in the *Adams* case.

Neither of these cases makes reference in any way to the Interstate Commerce Act, and therefore are announcements of this court's interpretation of the applicable common-law. But in the later case of *Charleston, etc. Ry. Co.* v. *Thompson*, 234 U. S. 576 (where the facts are exactly similar to those in the case at bar), the opinion deals with the conditions on a free interstate pass exempting the carrier from liability, issued *gratuitously* to the plaintiff under the Hepburn Act of June 29, 1906, just as was the pass in the present case. In the Thompson case, inasmuch as the validity of the stipulations exempting from liability had previously been held to be valid and not against public policy, the principal question under investigation for determination was whether or not the pass issued to a member of an employe's family was really a *free* pass, or was issued in part consideration of the services of the employe. The conclusion reached was that such pass was entirely *free* or gratuitous. Having reached this conclusion, a decision in favor of the carrier was easily reached. Mr. Justice Holmes writing the opinion, said:

> "As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals, as we have stated, and is established by the decisions of this Court, *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440. *Boering* v. *Chesapeake, Beach Ry. Co.*, 193 U. S. 442. Judgment reversed."

It is to be observed that the opinion in the Thompson case does not even suggest the possibility that the liability of the carrier was to be determined by the law of the state where the injury occurred. From this it is plain that this Court had no doubt or question but that Federal law governed as to liability, in a case where the pass is interstate and is free or gratuitous.

This Court was again called upon to determine the force and effect of stipulations on a pass releasing the carrier from liability for negligence in the case of, *N. Y. Central Ry. Co.* v. *Mohney*, 252 U. S. 152.

In that case the question principally discussed was whether Mohney was making an *intra* or *interstate* trip. The injury occurred in the State of Ohio where such stipulations are held to be void. The majority of this Court held that Mohney was making an *intrastate* trip, and therefore the stipulations on the pass were properly interpreted and controlled by the law of the State of Ohio. Again there is no suggestion anywhere in this opinion that if Mohney's journey had been found to be *interstate*, the law of Ohio would have had any application to the release on the pass. Indeed it is clear that this Court in the Mohney case was of the opinion that whether the release clause was to be governed by State or Federal law depended on whether the journey was *intra* or *interstate*. Otherwise what point or purpose was there in ascertaining, as the Court did, whether the trip was interstate

or intrastate. If this Court had been of the opinion that the release clause was to be determined by the law of the State in which the accident happened, regardless of the character of the trip made, then it was doing a useless thing in analyzing the law and facts to determine whether the trip was *inter* or *intrastate*. Two of the Justices, Mr. Justice Day and Mr. Justice VanDeVenter announced in the Mohney case the exact proposition for which petitioner is contending. They said, page 158:

> "Being of the opinion that Mohney was using the annual pass in an interstate journey and that *to such a use of the pass the Ohio law was inapplicable.*" (Italics ours.)

We, therefore, confidently assert that the four decisions of this Court cited above show unmistakably that where the pass is absolutely gratuitous, as here, and is an interstate pass, and the holder is making an interstate journey thereon, then the stipulations are governed and controlled by *Federal* and not State law. In the case at bar this rule was not applied and therefore, petitioner has been denied a right to which it was entitled under the law, and this Court should issue its proper writ to correct the judgment of the State Court, and to announce clearly the true rule which is to govern in these cases.

We might appropriately terminate here this brief and these suggestions in support of the petition, because the right to review in this Court has been, we feel, clearly demonstrated. But a brief consideration of the reason given by the Supreme Court of Missouri for its judgment against petitioner may not be out of place.

The Legislation by Congress Is Sufficient to Take the Question Involved in This Case Away From State Regulation.

The State Court concedes that under the common law, as interpreted by the Federal Courts, the stipulations on this free pass are "valid and enforcible," but the State Court refused to apply the interpretation of the common law made by the Federal Court for the stated reason that the Congressional Legislation concerning the issuance of passes by carriers does not go far enough to place a question such as exists in this case, that is the validity of the release stipulation on the pass, under the operation of Federal law, but that such question is still one for State regulation. The language of the Supreme Court of Missouri being as follows:

> "Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several States."

The error in this position of the State Court is in failing to recognize that the "necessary effect" of the legislation of Congress bringing the issuance of free interstate transportation under Federal Law and the operation of the Interstate Commerce Act is to likewise place under the operation of Federal Law *all questions* arising out of the issuance of such passes and to exclude the continuance of state power or state regulation with reference thereto. This applies just

as much to the *liability* arising in connection with the use of a free interstate pass as to the issuance of the pass itself.

It is hardly worth while to go extensively into the cases showing the many instances where state power is excluded after the subject matter has been brought under the operation of Federal Law. However, there are two classes of cases which are so closely analogous and which show so clearly that the question of liability is under Federal Law, where the *general* subject has been brought under that law, even though there is no express mention of liability in the Federal legislation, that it may be useful to point them out. These cases are:

(1) The Telegraph Cases.

(2) Decision of this Court as to assumption of risk in cases arising under the Federal Employers' Liability Act.

1. Telegraph Cases.

After the original Interstate Commerce Act was passed, Congress included telegraph companies among the carriers upon whom that act should operate. It declared them to be "common carriers within the meaning and principle of this Act." In Section 3 it prescribed for just and reasonable charges to be made by telegraph companies, made provision for classification of telegraph messages, and then subjected such companies to the same penalties for the *violation* of the Act as theretofore imposed upon other carriers. It will be noted that in the Federal Act there is nothing said in regard to the liability of telegraph companies for *failure to deliver messages promptly*—just as in the Federal legislation concerning the issuance of free transportation, nothing is said concerning the

measure of damages imposed upon the carrier, nor as to its liability for *failure to safely carry a passenger* using a free interstate pass issued under the provisions of the Act. The two omissions, if they can be so called, are in principle exactly the same. The business of a telegraph company is to send and deliver messages, just as the business of a passenger carrier is to transport passengers from one point to another. In neither instance is there in the Federal Act an attempt to specifically legislate with respect to liability in case of failure.

There existed and still exists in certain states statutory penalties imposed on telegraph companies for failure to make prompt delivery of messages, and because of the fact that in the Federal Act nothing was specifically said about the telegraph companies' liability for failure to so deliver messages, it was claimed that these statutes were still left in full force and effect and could operate on telegraph companies, even though a message sent was *interstate*. But that contention was decided to the contrary by this court, which held that *state power and state regulations were no longer operative.*

Western Union Telegraph Company v. *Brown*, 234 U. S. 542;

Telegraph Company v. *Lumber Company*, 251 U. S. 27 (reversing 116 Mississippi 660, where the control by the state law was asserted).

Telegraph Company v. *Boegli*, 251 U. S. 315 (reversing 187 Indiana, 238).

In the last case the Indiana court expressly held that the Act of Congress did not extend far enough to prevent the infliction of penalties by the states for failure to make prompt delivery of interstate messages.

But, again in this case (Boegli) the Supreme Court of the United States held that State law was excluded and that Federal Law applied, and, referring to its decision in *Telegraph Company* v. *Lumber Company* (*supra*), said that its ruling rested: (p. 317.)

> "Not alone upon the special provision of the Act of 1910, relating to unrepeated messages, *but upon the necessary effect of the general provisions of that Act, bringing Telegraph Companies under the control of the Interstate Commerce Act. The contention as to continuance of State power here made is to be adversely foreclosed.*"

These telegraph cases we think exactly support our contention in the present case and conclusively demonstrate the error of the Supreme Court of Missouri in its statement that the question of the carriers' liability to a passenger using a free interstate pass issued pursuant to the Act of Congress still "remains the subject of regulation by the several states." The Supreme Court of Missouri has itself bowed to and recognized the force of these Telegraph cases in excluding State regulation and the imposition of state penalties for failure to deliver interstate messages. *Leftridge* v. *Western Union Telegraph Co.*, 277 Mo. 90 (l. c. 97).

2. Assumption of Risk.

In the Federal Employers' Liability Act there is no express legislation as to liability or defenses that are open or available to the employer, except it is provided that neither contributory negligence nor assumption of risk shall be available to the Master where the proven negligence is a violation of a statute enacted for the safety or protection of the employee;

and that contributory negligence shall not be a complete bar to recovery, but only go in reduction of the damages. Under such legislation, it has been held from the beginning that the common law defense of assumption of risk (except as above stated) was available to the employer. The question then arose as to what rule of interpretation the doctrine of assumption of risk, when applicable as a defense, was to be tested or interpreted by—State or Federal. The State of Missouri through its Supreme Court took the position strongly that the doctrine of assumption of risk was to be applied in cases arising under the Federal Employers' Liability Act according to State law, and said in *Holloway* v. *Railway*, 276 Mo. 490 (l. c. 500), as follows:

> "The field is the liability of interstate carriers by rail for injuries to their employees and the enactment of the Federal law substituted it for all State laws on the same subject. The defense of assumption of the particular risk out of which the injury has grown having been left by the act untouched as it existed at common law, and full jurisdiction having been conferred upon the State courts for its enforcement, it follows that it must be determined and judicially enforced according to the common law existing in the State in which it accrued as if the act had not been passed. This is the doctrine distinctly announced by this court in *Fish* v. *Railroad*, 263 Mo. 106, 123, and *Williams* v. *Pryor*, 200 S. W. 53."

But through the channel of the last mentioned case, *Williams* v. *Pryor*, the question reached this court and is reported under the title "*Pryor, Receiver* v. *Williams*, 41 Sup. Ct. Reporter No. 4, page 36," and this Court decided exactly contrary to the Supreme Court of Missouri, and held that the doctrine of

assumption of risk was to be applied according to Federal Law and decisions, and not State, and for this express reason reversed and remanded the judgment of the Supreme Court of Missouri in *Williams* v. *Pryor*, (*supra*).

We therefore respectfully insist that, even if the question here involved had not been expressly decided in petitioner's favor, as it has in *Railway Co.* v. *Thompson*, 334 U. S., and *Railway Co.* v. *Mohney*, 252 U. S., still this Court, following its rulings and principles announced in the Telegraph cases and in *Pryor* v. *Williams*, would be obliged to hold that the question of liability to the holder and user of a free interstate pass was the subject of Federal regulation and control, and that State regulation was excluded.

From the foregoing we think it clear that the petitioner has been deprived of a right to which it is clearly entitled under Federal Constitution and law, and that this Court should accordingly grant its writ to correct and reverse the erroneous decision of the Supreme Court of Missouri denying such right.

Respectfully submitted,

Cyrus Crane

A. F. Smith

Attorneys for Petitioner.

F. H. MOORE,
RAY BOND,
Of Counsel.

FILED
OCT 12 1922
WM. R. STANSBURY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 142.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

ELIZABETH VAN ZANT,
Respondent.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF PETITIONER.

SAMUEL W. MOORE,
FRANK H. MOORE,
CYRUS CRANE,
Attorneys for Petitioner.

October 10, 1922.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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Supreme Court of the United States,

OCTOBER TERM, 1922,

No. 142.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

ELIZABETH VAN ZANT,
Respondent.

BRIEF OF PETITIONER.

Statement.

A writ of *certiorari* was issued herein on October 17, 1921, to the Supreme Court of Missouri to review its decision affirming a judgment in the sum of $8,000.00 for personal injuries in favor of Elizabeth Van Zant, known also as Mrs. L. A. Goodrich (Rec. 11), who, for convenience, will be referred to as the plaintiff, against the petitioner, which will be referred to as the defendant. The sole question involved is the validity of a stipulation in a free interstate railway pass upon which plaintiff was being transported at the time she received the in-

juries complained of, by the express terms of which she agreed to assume "all risk of accident and damage to person and baggage".

The facts are simple and undisputed. The plaintiff and her son, John M. Goodrich, constituted a family residing at Pittsburg, Kansas. The son was employed by the defendant as a flue borer in its round house at that place (Rec. 12), and supported his mother. Upon the request of the son, the defendant, in August, 1917, issued a free interstate pass to the plaintiff from Pittsburg, Kansas, to Howe, Oklahoma (Rec. 16). This pass carried on its back the following conditions, which were assented to by the plaintiff by signing her name thereunder:

CONDITIONS.

Good for stop-over at will on application to conductor.

This pass is not transferable, must be signed in ink by the holder thereof, and *the person accepting and using it thereby assumes all risk of accident and damage to person and baggage.*

Forfeited if presented by other than person named and may be revoked without notice.

The above conditions are hereby agreed to. I also represent and declare that I am not prohibited by Federal and State laws from receiving free transportation and this pass will be lawfully used.

While making an interstate trip on this pass the plaintiff received injuries at a point in the state of Missouri, by falling from her seat into the aisle of the car by reason of the jarring or jolting of the train, due apparently, but not certainly, to some derailment or wreck (Rec. 10). There was no claim in the petition and no evidence that the defendant was guilty of wanton or wilful negligence.

Under the law, as declared by the State courts

of Missouri, where the accident occurred, the conditions on the back of the pass by which the user assumes risk of accident and damage to person are held to be void as against public policy. A different rule prevails in the Federal courts, which hold that stipulations in free passes, such as the one here in question, are valid and binding. The defendant insists that the pass in question was issued under an Act of Congress, known as the Hepburn Act of June 29, 1906, and that the stipulation against liability is governed by the rule of the Federal courts.

The defendant in its answer pleaded the release above quoted in bar of the action, but its plea was overruled and judgment rendered by the Circuit Court of Jasper County, Missouri, against the defendant in May, 1919, in the sum of $8,000.00. An appeal was taken to the Supreme Court of Missouri, and in June, 1921, the judgment of the Circuit Court was affirmed. The Supreme Court held that the release in question was governed by State laws, saying (R. 24):

> Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several States.

The defendant contends that the Supreme Court of Missouri has erred in its conclusions and earnestly insists that the plaintiff's stipulation to assume all risk of accident and damage to person is valid and binding, and that it constitutes a complete bar to her claim for damages.

Specification of Errors.

1. The Supreme Court of Missouri erred in entering judgment affirming the judgment of the Circuit Court of Jasper County, Missouri, and, in effect, holding that a stipulation in a free interstate railway pass, issued under the Hepburn Act of June 29, 1906, that the holder assumes all risk of accident and damage to person is void and of no effect; and in failing to hold that such a stipulation is valid and binding.

2. The Supreme Court of Missouri erred in holding that the validity of the stipulation in a free interstate railway pass, issued under the Hepburn Act of June 29, 1906, in which the holder assumes all risk of accident and damage to person is to be determined by the law of the State rather than by the rules of liability which obtain in the Federal courts.

3. The Supreme Court of Missouri erred in failing and refusing to hold that Congress in passing the Act to Regulate Commerce and the amendments thereof, and particularly the amendment of June 29, 1906, intended to take possession of the subject of free interstate passes, including the subject of the liability of the carrier for personal injuries sustained while using such form of transportation in an interstate journey.

4. The Supreme Court of Missouri erred in not reversing the judgment of the Circuit Court of Jasper County, Missouri, upon the ground that the stipulation in the pass upon which the plaintiff was riding at the time was valid and binding and constituted a complete bar to any recovery.

BRIEF.

By the Act of June 29, 1906, Congress assumed possession of the subject of free interstate passes, including stipulations contained therein affecting the liability of carriers to persons riding thereon in interstate journeys, and thereby superseded all State control of the subject.

The original Act to Regulate Commerce, passed in 1887, did not expressly prohibit free transportation, and it was only when such transportation constituted discrimination and was not in the exception contained in section 22 of the Act that it was illegal. The first general prohibition of free transportation, and the first express authorization of free transportation, except in certain specified instances permitted by section 22, appeared in the amendment of June 29, 1906, which, for convenience, is here reproduced:

> No common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and home-

less persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such homes; to necessary care takers of live stock, poultry and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents; witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate ticket, free pass, or free transportation, shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an act entitled "An act to further regulate commerce with foreign nations and among the states," approved February nineteenth, nineteen hundred and three and any amendment thereof.

In the Act of April 13, 1908, a proviso was added expanding the meaning of the word "employees", as follows:

> Provided further, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier.

In the amendment of June 18, 1920, which is not involved herein, a further proviso was added making provision for the exchange of passes or franks with telegraph, telephone and cable lines.

Section 22 of the Act to Regulate Commerce of 1887, as subsequently amended, made provision for free or reduced rates of transportation in certain limited instances. Omitting the provisions relative to interchangeable 5,000-mile tickets, the section as amended reads as follows:

> That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be

> construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: Provided, That no pending litigation shall in any way be affected by this Act.

The evident purpose of Congress in its amendment of 1906, above quoted, was to bring the whole subject of interstate transportation under direct national control. The issue of free transportation, unregulated except by the general anti-discrimination provisions of the original Act to Regulate Commerce of 1887, and by the several States whose efforts to enforce their statutes were not attended with great success, had resulted in gross discrimination. The evils of the practice were pointed out in the first annual report of the Interstate Commerce Commission (1 I. C. R. 650-654). In its third annual report to Congress, in 1889, the Commission, in the course of a long discussion on the subject, said:

> The statute undoubtedly was framed to prohibit passes or free transportation of persons,

> as one of the forms of unjust discrimination, favoritism, and misuse of corporate powers that had grown into an abuse of large proportions and become demoralizing in its influence and detrimental to railroads, both in loss of revenue and in provoking public hostility. * * * The lav aims at the correction of the abuses of free transportation, and, in accomplishing this general purpose, some forms of free or reduced transportation that at first view might appear plausible, or even unobjectionable in themselves have to fall under its general restrictions. * * * The discrimination is equally unjust whether the free transportation be complimentary or to aid some person's business, or for some supposed indirect advantage to the carrier. The correction of the evil, and the equality of right to which all are entitled, required the restrictions to be general and sweeping to furnish any substantial assurance that the abuse should not be continued or new ones devised under cover of any discretion left to the carrier.

State legislation could not be expected to remedy the evils of free interstate transportation. In the nature of things, such legislation would not be uniform either in its restrictions or its methods of enforcement. The general anti-discrimination provisions of the original Act had afforded no relief. National legislation of a comprehensive character, therefore, was imperatively necessary to provide one uniform rule covering the subject of free transportation, and one uniform method of its enforcement. The amendment of 1906 was responsive to this demand.

Congress, we contend, reached out and took over the entire subject of free interstate transportation, specifying with particularity the persons to whom it might lawfully be issued and providing penalties for infractions of the law on the part of the indi-

vidual as well as on the part of the carrier. This of necessity deprived the states of all power or authority to legislate with respect to such transportation. The exertion of national power would be frustrated and nullified if authority remained in the several States to encroach upon or in any manner to affect the subject matter with conflicting statutes or decisions. The Federal power became supreme not only over the subject of the issuance of free transportation, but also over all matters directly relating thereto, such as the terms and conditions on which such transportation should be issued.

The stipulation in a free interstate pass releasing the railway company from liability is a part and parcel of the pass itself. The pass is a license, and the person to whom it is issued is a licensee (*Northern Pacific Ry. Co.* v. *Adams,* 192 U. S. 440-454), and the terms and conditions on which it is issued and given validity are an integral part of the license itself. A release of all claims for personal injuries has always been a condition to the use of free transportation. Such a stipulation was upheld in 1858 (*Welles* vs. *Ry. Co.*, 26 Barb. 641; affirmed 24 N. Y. 181). The carrier waives its right to compensation, and the pass holder waives his right to claim damages for injury to his person or his property. The stipulation ordinarily appears upon the back of the pass, which the user is required to agree to and sign before the pass has any validity whatsoever. Until it is signed, the pass is incomplete and is not valid for transportation.

The pass in this case might well have said on its face, "Pass Mrs. L. A. Goodrich from Pittsburg to Howe, but only on condition that in consideration of the license hereby granted, she release the Railway Company from all claims for damages growing out of any personal injuries she may sustain." The

legal effect would have been precisely the same. The fact that the release was on the back of the pass instead of on its face is of no consequence. The *pass* consisted of writing and printing on both sides of the paper. This was the *pass* over which Congress assumed jurisdiction by the amendment of 1906. That part of the pass which consists of the release, equally with that part which authorized the plaintiff to travel free from Pittsburg to Howe, was thus withdrawn from the domain of State legislation.

Congress is presumed to have known that from the very beginning a release from claims for personal injuries was a part and parcel of every free pass, and to have enacted the 1906 amendment with that fact clearly in view. The passenger might elect to pay his fare, in which event he disabled the company from contracting against its negligence; but if he accepted the privilege of free transportation, he did so at his own risk of personal injury. The release was a universal incident to every free pass, and it cannot be assumed that Congress did not intend by the amendment of 1906 to place the entire pass—release and all—under Federal authority and jurisdiction.

Indeed, in February, 1904—some two years before the 1906 amendment,—this court, in *Northern Pacific Ry. Co.* v. *Adams, supra,* had occasion to construe a railway pass containing the usual release clause, and held that the stipulation in the pass agreeing that the railway company should not be liable for injury to the person, was valid and binding. The court there said (pp. 451; 453-454):

> The question, then, is distinctly presented whether a railroad company is liable in damages to a person injured through the negligence of its employees, who at the time is riding on

> a pass given as a gratuity, and upon the condition, known to and accepted by him, that it shall not be responsible for such injuries. * * *
>
> In the light of this decision but one answer can be made to the question. The railway company was not, as to Adams, a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to the common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege; and, having accepted that privilege, cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby.

Again, in March, 1904, this court decided the case of *Boering* v. *Chesapeake Beach R. Co.*, 193 U. S. 442, where, following the *Adams* case, *supra*, it was held:

> A stipulation in a free railway pass, requiring the user to assume the risk of injury due to the carrier's negligence, is binding on a person accepting the privilege, although notice of such stipulation may not have been brought home to her.

Congress is presumed to have enacted the amendment of 1906 with full knowledge of these deci-

sions. It knew that the usual release stipulation was an integral part of the pass itself, and that the use of a free pass involved a waiver on the part of the carrier of its compensation, and likewise a waiver on the part of the user of the pass of any claim for damage to his person. It may also be assumed that Congress knew of the conflicting rules of State decisions and conflicting State statutes, some of which gave and others denied compensation. Under these circumstances, it was the part of wisdom for Congress to assume jurisdiction of the entire subject matter, prescribing one uniform rule for the use of free interstate transportation, and likewise one uniform rule affecting the validity of the ordinary stipulation relieving the carrier of liability for personal injuries. This, we submit, is what was accomplished by the Act of June 29, 1906, with the result that the State statutes and State decisions affecting the subject were superseded by the Federal statute and the Federal rule of nonliability.

The validity of a stipulation against liability contained in a free interstate pass issued by a railway company under the Act of June 29, 1906, came before this court (*Charlestown R. Co.* v. *Thompson,* 234 U. S. 576) upon writ of error to the State Court of Georgia. A recovery had been had in the lower court, and this was affirmed upon appeal. In this court it was urged, as appears from the brief of defendants-in-error (58 L. ed. 1478) that "liability under free pass is a State, and not a Federal, question." It was held, however, that a Federal question was presented, and the motion to dismiss was overruled. Upon the merits, it was held that the pass there in question was issued gratuitously, and

that the stipulation contained therein relieving the carrier from liability was valid and binding, the ruling being accurately reflected in the syllabus (58 L. ed. 1477), as follows:

> A railroad carrier may validly stipulate in a pass for interstate transportation issued gratuitously to the wife of an employee under the authority of the Act of June 29, 1906, section 1, that it shall not be liable for negligent injury to her person.

In this case, the Supreme Court of Missouri has reached what we consider to be an erroneous conclusion in holding that Congress has not legislated with respect to "the validity of stipulations or conditions annexed to such passes exempting the carrier from liability, and that, therefore, these matters remain the subject of regulation by the several states." In other words, the State court holds that the terms and conditions upon which a free pass is issued, and which are incorporated in and made a part of such pass, are within the control of the several states. Although a free pass may be issued pursuant to an exertion of Federal authority, nevertheless, it is said, it remains for the several states to say which of the conditions, terms and limitations contained in the pass are valid and which are invalid.

But it is entirely clear that if the several states may control the terms and conditions upon which free interstate passes are issued, they may defeat the operation and effect of the act of Congress. Not only may the several states invalidate the stipulation in an interstate free pass relieving a carrier from liability for personal injuries, but they may likewise affect its other terms and conditions. For

illustration, a pass is ordinarily conditioned that it may not be used for passage upon fast limited trains, such as the Congressional Limited, the Twentieth Century Limited, the Broadway Limited or the California Limited; may State authority override this limitation and validly provide that all, or any designated class of interstate passes shall be accepted upon these limited trains, as well as upon all trains? A pass is ordinarily conditioned to be non-transferable and subject to forfeiture if presented for passage by any other than the person to whom it was issued. Is the validity of these provisions to be tested by State statutes and decisions of State courts? Passes also contain a time limit, during which they are valid for passage. Is this likewise subject to State regulation? Following the passage of the Act of June 29, 1906, the Interstate Commerce Commission formulated and promulgated various rulings relative to the issue of free interstate transportation, prescribing its form, designating the persons who come within its provisions, defining the word "family" as used in the Act, etc. (*Watkins on Shippers and Carriers,* Third Edition, Volume I, pp. 648-652). May these rulings and regulations be amended or repealed or superseded by State authority? Many other illustrations might be given.

Such an admixture and intermingling of Federal and State authority would be intolerable. Federal control of interstate transportation would be nullified by State enactments; and Federal laws, instead of being supreme, would become subordinate to State authority. The confusion that would result is aptly illustrated by the confusion which actually existed in the enforcement of a carrier's liability for loss or damage to freight shipments prior to the enactment of the amendment of June 29, 1906.

"Prior to that amendment", says this court in *Adams Express Co.* v. *Croninger,* 226 U. S. 491:

> the rule of carriers' liability, for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law, as declared by this court and enforced in the Federal courts throughout the United States (*Hart* v. *Pennsylvania R. Co.,* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151), or that determined by the supposed public policy of a particular state (*Pennsylvania R. Co.* v. *Hughes,* 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132), or that prescribed by statute law of a particular state (*Chicago, M. & St. P. R. Co.* v. *Solan,* 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289).
>
> Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. * * *
>
> That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. *Northern P. R. Co.* v. *Washington,* 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; *Southern R. Co.* v. *Reid,* 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; *Second Employers' Liability Cases* (*Mondou* v. *New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169.

The Act under consideration in the foregoing case expressly provided that the common carrier receiving property for transportation should issue a bill of lading therefor and should be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any connecting carrier. The Act of June 29, 1906, providing for the issue of free interstate transportation, is silent on the subject of the liability of the pass holder for personal injuries, but this is no answer to our contention that the Federal authority has taken over the entire subject of free interstate transportation, including the stipulations upon which it may be issued, and their validity.

The decision of this court in *Postal Telegraph Co.* v. *Warren-Godwin Lumber Co.*, 251 U. S. 27, is ample authority for this statement. There the question was whether a contract limiting the liability of a telegraph company for error in sending an unrepeated interstate message to the refunding of the price paid for the transmission of the message, should be determined by the law of the State or by the law which obtained in the Federal courts. Under the law of the State the contract was void. The State court, where the case was tried, applied the State law, held the contract invalid, and rendered judgment against the Telegraph Company. The sole question presented, when the case came to this court, was whether Congress by the Act of 1910, bringing telegraph companies under the Act to Regulate Commerce, occupied the entire field to the exclusion of State control. It will be noted that the Act of 1910 went no further than to enact that the provisions of the Interstate Commerce Act should apply to "telegraph, telephone, and cable companies engaged in sending messages" from one state to another, specifying that the charges for the

service shall be reasonable, and that messages by telegraph may be classified into day, night, repeated, unrepeated, commercial, press, Government, and such other classes as are just and reasonable, and that different rates may be charged for different classes of messages. There is no language in the Act touching the liability of telegraph companies for failure properly to transmit messages, or the validity of contracts which they may make respecting the same. The following was the contention of respondent, as appears from his brief (which is substantially the view taken by the Supreme Court of Missouri in this case), (64 L. ed. 119):

> Until specific action by Congress regulating the liability of telegraph companies to their patrons in respect to interstate commerce, the laws of the states are applicable.

But this court held that Congress by the Act of 1910, above summarized, had occupied the entire field of the interstate business of telegraph companies, including the validity of stipulations affecting liability for negligence in transmitting messages, so as to exclude State action. The court said:

> In the first place, as it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish, —a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent, and it may be, conflicting, local laws.

Not only are the contracts of a telegraph company limiting its liability in the transmission of interstate messages removed from the control of State authorities, but even the delivery of messages to their addressees after their receipt in the state is likewise free from state control. The State of Indiana undertook to impose a penalty upon telegraph companies for failure to deliver promptly interstate telegrams arriving in that state, but this court held (*Western Union Tel. Co. v. Boegli*, 251 U. S. 315), that the Act of 1910 completely deprived the states of all power to legislate on the subject of interstate telegrams, the decision being reflected in the following syllabus (64 L. ed. 282):

> Congress has so far taken possession of the field by enacting the provisions of the Act of June 18, 1910, bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, as to prevent a state from thereafter penalizing the negligent failure of a telegraph company to deliver promptly an interstate telegram in that state.

Similarly, it has been held by this court that the Federal Employers' Liability Act has occupied the entire field with respect to the liability of carriers for damages to employees, to the exclusion of State control. Thus, a state statute which provides that in actions against railroads for damages, proof of injury inflicted by an engine propelled by steam shall be deemed *prima facie* evidence of negligence, is invalid (*New Orleans R. Co.* v. *Harris*, 247 U. S. 367); a local Workmen's Compensation Act is invalid in the case of employees injured while engaged in interstate commerce (*New York Central R. Co.* v. *Winfield*, 244 U. S. 147); State statutes undertaking to abolish assumption of risk as a bar to an action are invalid (*Seaboard Air Line R. Co.*

v. *Horton,* 233 U. S. 492; *Pryor* v. *Williams,* 254 U. S. 43).

In section 22 of the Act, *supra,* it is provided "that nothing in this Act shall apply to * * * the issuance of mileage, excursion or commutation passenger tickets." It will be noted that there is nothing in the Act limiting the transferability of this form of transportation or otherwise prescribing the terms or conditions on which it may be issued. The same argument that is made by the respondent in the case at bar might be urged in support of the proposition that as the statute was silent touching the transferability of these tickets, that subject was not taken over by Congress, but remained subject to State regulation. But this court, in *Bitterman* v. *Louisville & N. R. Co.,* 207 U. S. 205, decided otherwise, holding that the issuance of these passenger tickets having been authorized by Congress, there arose by necessary implication from the language employed and by reason of the uniformity sought to be established thereby the right and the duty of the railway company to make them non-transferable.

The stipulation against liability contained in the pass on which the plaintiff was riding was a contract entered into pursuant to Federal authority. The Hepburn Act permitted carriers to issue free interstate transportation to employees and their dependents, and, by necessary implication, to issue such transportation on the usual and customary conditions. In authorizing the issuance of a free pass, Congress likewise authorized this inseparable incident to all free transportation. The parties to a contract authorized by an Act of Congress, such as the stipulation in this case, are entitled to have its validity determined and its terms construed in accordance with the rules which obtain in the national courts to the exclusion of the rules which

obtain in State and local courts. Such is the ruling of this court in *Tullock* v. *Mulvane*, 184 U. S. 497, where an injunction bond had been given in the Federal court, and in an action upon the bond in the State court, it was sought to apply the local law permitting a recovery of attorney's fees for procuring a dissolution of the injunction. The State court permitted a recovery, but the judgment was set aside by this court, which expressed its views in the following pertinent language (pp. 512-513):

> For if it be true, and it undoubtedly is, that the giving of such a bond was an act done pursuant to an authority exercised under the Constitution and laws of the United States, it must follow that the bond so taken is to be interpreted with reference to the authority under which it was given and the principles of jurisprudence controlling such authority, and not by the local law. To hold the contrary, as we have previously pointed out, would be but to declare that although the power conferred by Congress upon this court to adopt equity rules is controlling, nevertheless the interpretations of the rules and the limitations which arise from a proper construction of them, as expounded by this court and enunciated in its decisions, are without avail. And this yet further points out the fallacy involved in the contention that the lower court, in passing upon the issues, decided merely a question of general law involving no Federal controversy. Now it is at once conceded that the decision by a state court of a question of local or of general law involving no Federal element does not as a matter of course present a Federal question. But where, on the contrary, a Federal element is specially averred and essentially involved, the duty of this court to apply to such Federal question its own conceptions of the general law we think is incontrovertible. *Avery* v. *Popper*, 179 U. S. 305, 315, 45 L. ed. 203, 207, 21 Sup. Ct. Rep. 94.

In the Carmack amendment of June 29, 1906, it is provided that the carrier receiving a shipment shall issue a bill of lading and that the initial carrier shall assume not only its own responsibility for loss or damage, but that of any connecting carrier. The statute provides for the issuance of a "bill of lading", but does not specify any of its terms or conditions, precisely as the statute in the case at bar provides for the issue of free interstate transportation, but without specifying any of the terms or conditions upon which it is to be issued. But in the former case it is ruled that Congress in providing for the issuance of bills of lading and the assumption of liability on the part of the initial carrier has drawn to itself jurisdiction of all the terms and conditions which the bill of lading contains (*Cincinnati R. Co.* v. *Rankin,* 241 U. S. 219; *Missouri, Kansas & Texas R. Co.* v. *Harriman Bros.,* 227 U. S. 657). Are we not completely justified, therefore, in insisting that when Congress took over the issuance of free interstate passes, it likewise took over all the terms or conditions or stipulations contained therein, and reserved to its system of jurisprudence the exclusive right of determining their validity?

It is respectfully submitted that the judgment of the Supreme Court of Missouri was erroneous and should be reversed.

New York, October 10, 1922.

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ANSWER AND AUTHORITIES AND BRIEF OF RESPONDENT IN OPPOSITION TO GRANT OF CERTIORARI.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. [redacted]142

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

ELIZABETH VAN ZANT, RESPONDENT.

ON PETITION FOR WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

CHARLES H. MONTGOMERY,
Attorney for Respondent.

NORMAN A. COX, and
HUGH DABBS,
Of Counsel.

(28,418)

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No. 463.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

ELIZABETH VAN ZANT, RESPONDENT.

ON PETITION FOR WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

RESPONDENT'S ANSWER TO PETITION FOR CERTIORARI.

Elizabeth Van Zant, by her attorney, answering the petition for writ of certiorari herein filed by The Kansas City Southern Railway Company, respectfully represents as follows:

(1) The judgment of the state trial court is supported on sufficient ground independent of any Federal question claimed to have been raised. The contract of release for accident and damage pleaded as a defense by petitioner does not contain any provision releasing petitioner from liability for its negligence.

(2) Points 8, 9 and 10 of petitioner's application are raised too late, being raised for the first time in this court, and never having been presented to the trial court or to the Missouri Supreme Court.

(3) Section 8563, paragraph 5, U. S. Compiled Statutes for 1916, the so-called free-pass provision of the Hepburn Act, urged by petitioner as its sole defense to its liability for negligent injury of respondent, does not legislate as to the question of liability of a carrier for negligent injury to a person riding on an interstate free pass; neither does it legislate as to the matter of a contract between the carrier and the person riding on the pass concerning such liability. Congress not having legislated on these matters, the State of Missouri is left free to apply its local laws as to such liability for injury to a passenger within its borders, and to apply its local laws as to the validity of a contract concerning such liability.

The question and issue urged by defendant in the trial court and in the Supreme Court of Missouri, as a defense to plaintiff's action for admitted negligent injury, is a non-Federal one, and was so decided against applicant for certiorari in the state court, and no right,

title, privilege or immunity under Federal Law was specially set up in the state court by defendant which was denied by that court.

(a) The cases relied upon by petitioner do not support its theories for the reason that in those cases the question in issue here was not before this court for determination, and was not passed upon.

(b) This court has never held that Congress, by the Hepburn Act, has taken over the field of liability of a carrier for negligent injury to a person riding on a free interstate pass, or the question of the right of the carrier to contract with the passenger concerning such liability, and these matters, in cases arising and tried in the state court for negligent injury within its borders, are controlled by state law or the application of the common law as interpreted by the state court.

(c) In determining the validity of such contract concerning the carrier's liability for its negligence, this court has distinguished between cases which arise *nisi* in Federal Court, where the contract of release is held valid by Federal interpretation of the common law and not by an application of the Hepburn Act, and cases which are tried *nisi* in state court for negligent injury to a passenger within the borders of the state, and which come to this court by certiorari or writ of error to the state court, in which instance this court applies the local or state law as to the liability and the validity of the contract, and confines its review to the question as to whether or not the state court, in applying its local law,

has misinterpreted or misapplied some Federal question directly arising in connection therewith.

Wherefore, respondent prays that the petition for certiorari be dismissed, with costs.

Charles F. Montgomery.
Attorney for Respondent.

NORMAN A. COX and
HUGH DABBS,
Of counsel.

SUGGESTIONS AND BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This action was commenced some four years ago in the Circuit Court of Jasper County, Missouri. Respondent here, as plaintiff, charged that while riding on defendant's train as a passenger, in Missouri, she was injured through the *negligence of defendant.*

It is undisputed that defendant (the petitioner here) was an interstate carrier of passengers and that plaintiff received her injury, *in the State of Missouri,* while riding on a pass issued by defendant to her minor son (an employee of defendant *who lived with plaintiff in her household*) for her use, without pay, for an interstate journey from Pittsburg, Kansas, through Missouri, to Howe, Oklahoma.

The sole defense pleaded and relied upon was "that plaintiff received her injury while on an interstate journey riding on a free pass issued under Article Five of the Federal Law known as the Interstate Commerce Act, which permits the issuance of said free transportation to employees of railroad companies and their families;" that the pass contained a stipulation on the back that "the person accepting and using it, thereby assumes all risk *of accident* and damage to person

and baggage;" that said pass, "being interstate, issued under the *Federal law above mentioned,* is to be interpreted and controlled in its effect and operation by decisions of the *Federal Courts construing said Federal Act;*" "that under said decisions the conditions on said pass above quoted are valid and binding on the plaintiff and by reason thereof, plaintiff having assumed all risk of accident and damage to her person is precluded and prevented from recovering damage on account of the matters and things alleged in her petition" (Pleading, by inference, that she assumed the *risk of negligence* of defendant.)

(Trans, pp. 4-5, folios 8-9.)

Replying, plaintiff *denied* that she assumed the risk of accident or damage to her person *due to defendant's negligence;* alleged that her action was based upon, and was to be determined by, the law of the State of Missouri, in the court and under the laws of which state the action was brought, and was not based on Federal statute or law; that the stipulation on the back of the pass, if it is urged to relieve defendant from liability for its own *negligence,* was void both under the law of Kansas, where the pass was issued, and the law of Missouri, where the injury occurred (Trans. 5-6-7, folios 10 to 13).

It was, and is, conceded by defendant (applicant for certiorari) that under the law of both Kansas and Missouri, a contract or stipulation on the part of a common carrier to limit or relieve itself fom liability

for damages to a passenger caused by the *carrier's negligence* is void.

The record shows that plaintiff was thrown from her seat in defendant's train by a wreck or derailment, and injured. Under Missouri law, this not being contradicted by evidence to the contrary, raises a presumption of negligence on the part of the defendant.

Norris v. *Railway*, 239 Mo. 695, l. c. 715.
Partello v. *Mo. Pac. Ry.*, 240 Mo. 122.

There was no dispute as to defendant's negligence in the trial court, and only such part of the record as affected the single question appealed on was printed by defendant.

The trial resulted in a general judgment in plaintiff's favor.

In its motion for a new trial, defendant did not present or preserve any constitutional point, and the only point presented and claimed to involve a Federal question was that the court erred in refusing to follow the law of the Federal Courts construing said *Article Five* (U. S. Compiled Stats., 1916, Sec. 8563), so pleaded by defendant, in determining the validity of the stipulation on the back of the pass.

In its assignments of error in the Appellate Court, defendant, in addition to the point preserved in its motion for new trial as above stated, presented this one point somewhat differently by assigning that the court erred in refusing to instruct that under Federal law (re-

ferring to the free pass provision of the Hepburn Act) the stipulation on the back of the pass was valid and binding.

Under Missouri practice only such points as are made issues and are called to the attention of the trial court in a motion for new trial, and are carried into an assignment of errors, and presented to the Appellate Court as distinct points, may be considered on appeal, and points not so preserved are waived.

Powell v. *Jackson County*, 262 Mo. 403.

On certiorari, the United States Supreme Court follows the same practice with the single exception that where some Federal question is presented in some other way to the state Appellate Court, and both sides are heard thereon and the state Appellate Court passes on the specific question, then it may be considered on certiorari.

Hiawasa Power Co. v. *Carolina-Tenn. Co.*, 252 U. S. 341-344.

In the present case, with this single question before it on appeal, the Missouri Supreme Court held that:

> "Congress has not legislated on the subject of the *rights* and *liabilities* of the parties in cases of interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act (Article Five, of Interstate Commerce Act relied upon by defendant) or *respecting the validity* of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several states."

Applying this local law, the court held that a stipulation relieving the carrier from liability for negligence was void.

Defendant filed in the Missouri Supreme Court a motion for a rehearing, making but the single point that the above holding of the court was wrong, and contending that certain Federal decisions cited by it, construing the above Act of Congress, held that Congress had taken over the entire subject matter of the questions in issue (*i. e.*, as to liability and as to the validity of the stipulation) to the exclusion of the states. This was the same point originally made in the Missouri Supreme Court, and the motion was overruled.

POINTS IN OPPOSITION TO CERTIORARI AND ARGUMENT IN SUPPORT THEREOF.

Certiorari should not issue for the following reasons:

1. The judgment of the trial court in plaintiff's favor is supported by sufficient ground, on the issues made, entirely outside of and independent of any Federal question claimed to have been raised in the case, and petitioner never appealed on this issue.

Defendant pleads *in haec verbae* a contract on the back of the pass as a defense to its liability to plaintiff for *defendant's negligence* resulting in plaintiff's injury. This contract so pleaded (Trans. 5, folio 9), on its face shows that it *does not contain* any provision releasing defendant from liability to plaintiff *for its negligence*, but only from liability for *accident* and damage to her person and baggage. Plaintiff *denies* that the stipulation or contract relieved defendant from liability to her for injuries *caused by defendant's negligence*. (Trans. pp. 6-7, folios 10 and 12.) Independent of the general denial in defendant's answer, plaintiff was entitled to judgment on the pleadings.

Accident, as used in this stipulation, is defined by this court in *Chicago, etc., Railroad Company* v. *Pullman Company*, 139 U. S., l. c. 86, as follows:

> "Accident or casualty, according to a common understanding, proceeds from an unknown cause, or is an unusual effect from a known cause."

"Accident is generally defined as an unusual and unexpected event happening without negligence."

Corpus Juris, Vol. 1, Sec. 5, pp. 392-393.

Thus the stipulation as to non-liability for *accident* and damage to plaintiff's person does not relieve defendant as to liability for damage to plaintiff's person *caused by the negligence of defendant,* as the parties did not contract with respect to defendant's liability for negligence.

In this respect the stipulation differs from those in the following cases cited by defendant:

New York Central R. R. Co. v. *Mohney,* 252 U. S. l. c. 153.

Charleston & West. Car. Ry. Co. v. *Thompson,* 234 U. S. 577.

Northern Pac. Ry. Co. v. *Adams,* 192 U. S. l. c. 442.

Boehring v. *Chespeake Beach Ry. Co.,* 193 U. S. l. c. 448.

In each and all of which cases the contract of release on the back of the pass contained, in substance, the specific provision that the party accepting the free pass agreed that the defendant carrier should not be liable for damage or injury to person *caused by the negligence* of the agents of such carrier.

Where, as here, the judgment of the trial court can be sustained on a ground independent of a Federal question, this court will refuse to review it on certiorari or otherwise.

Southern Pac. Ry. v. *Schuyler,* 227 U. S. l. c. 612.

2. Points 8 and 10 of defendant's application for certiorari, found at pages 5 and 6 of its application and brief, are urged *for the first time* in this court, and were never presented to the trial court or to the Missouri Supreme Court on appeal. Even if they had any merit, they are raised too late.

The title, right, privilege and immunity claimed to have been denied to the applicant for certiorari must have been *specially set up and claimed in the trial court and the Missouri Supreme Court*, and where not so set up, will not be considered by this court on application for certiorari.

> *Hiawasa Power Co.* v. *Carolina-Tenn. Co.*, 252 U. S. l. c. 341-344.
> *Cincinnati, etc., Ry.* v. *Pless*, 216 U. S. 78.
> *Chemical Bank* v. *Bank*, 160 U. S. 646.

3. *Even if* the pass had contained a stipulation relieving defendant from liability *for negligent injury* to plaintiff (and we have shown under our point 1 that it did not), yet the point is made:

> "Congress has not legislated on the subject of the *rights and liabilities* of the parties in cases of interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act (Article 5 of the Interstate Commerce Act pleaded by defendant as controlling (or *respecting the validity* of stipulations or conditions annexed to such passes exempting the carrier from liability, and therefore, these matters *remain the subject of regulation by the several states.*"

Southern Pac. Co. v. *Schuyler,* 227 U. S. l. c. 610-612.

C. R. I. & P. Ry. v. *Maucher,* 248 U. S. 359. 359.

Weir v. *Rountree,* 173 Fed. l. c. 779-781.

Smith v. *A. T. & S. F. Ry. Co.,* 203 U. S. 284.

Fowler v. *Penn. R. R. Co.,* 229 Fed. l. c. 375.

Wiley v. *Grand Trunk Ry. Co.,* 227 Fed. l. c. 129.

Beutler v. *Grand Trunk Ry. Co.,* 224 U. S. l. c. 85.

Clark v. *Southern Ry. Co.,* 119 N. E. 539.

Sec. 8563, paragraph 5, page 9069, U. S. Compiled Statutes for 1916, Anno. (West P. Co. Edition).

Points 5, 6, 7 and 9, urged by applicant for certiorari, in effect, simply deny the above proposition, and set forth that *said Act of Congress* (U. S. Stats. Sec. 8563) has taken over the *entire field of liability* as to persons riding on interstate free passes, and the entire field as to the validity of contracts connected with such passes relieving the carrier from liability *for its own negligence.* Urged in connection with this is the statement that decisions of the Federal Courts and this court have so construed *the act in question,* and that because thereof the State of Missouri is precluded from applying its local law as to liability and the rulings by its state courts as to the validity of a contract releasing the carrier from liability for its negligence.

On the contrary, the case of *Southern Pacific Ry. Co.* v. *Schuyler,* 227 U. S. l. c. 612, holds that the question of the carrier's liability and the question of the validity of the contract of assumed risk of the carrier's negligence *are not to be determined by the provisions of the Hepburn Act, but by the provisions of the local or state law where the accident occurred.*

Defendant cites the cases of *Charleston & West-Carolina R. R. Co.* v. *Thompson,* 234 U. S. 576, and *New York Central Ry. Co.* v. *Mohney,* 252 U. S. 152, as being to the effect that this court has held that Congress, by the Hepburn Act, has taken over the entire field as to liability of the carrier for injury to a passenger riding on an interstate free pass and of the validity of a contract connected therewith stipulating as to such liability. We do not so read these cases. They do not invoke the Hepburn Act to determine the liability of the carrier nor the validity of the stipulation, and they could not do so, because this court has already held, in the Schuyler case above cited, that the Hepburn Act does not deal with these questions. They invoke the Hepburn Act simply to determine

(1) Whether the pass is a free pass, and

(2) Whether the person using it comes within the prohibited class.

These two questions are not involved in the present case.

The case of *New York Central Ry. Co.* v. *Mohney,* 252 U. S. 152, l. c. 154-157, is distinguished from the present case *by the issues made and the questions before this court.*

The state Appellate Court held that Mohney, when injured, was an *interstate* passenger, and affirmed the judgment of the trial court on two grounds: (1) that the pass was issued for a consideration; (2) that the negligence of the carrier was willful and wanton; that for these reasons the release on the pass did not constitute a defense to the action, *which was brought in the state court originally.*

This court held the journey to be *intrastate,* and as the power of Congress to deal with commerce applies only to *interstate* commerce, a construction of an Act of Congress *could not be involved in this regard* (l. c. 157).

As to the question of willful or wanton negligence, the court refused to pass on the weight of the testimony (l. c. 157).

As to the holding that the pass was issued for a consideration, the court refused to rule or to take up the application of the case of *Charleston & West Carolina Ry.* v. *Thompson,* 234 U. S. 576, as to whether the pass was free, as the case had already been disposed of.

This case *does not pass upon the question,* and the question *was not before the court as to whether Congress has legislated on the rights and liabilities of the parties in cases of interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or*

conditions annexed thereto exempting the carrier from liability. Neither was the question of liability due to the fact that the carriage was interstate before the court, or passed upon.

Charleston & West Carolina Ry. Co. v. *Thompson,* 234 U. S. 576, is distinguished *on the facts.* In Georgia, where that case was *tried nisi in the state court,* the state law makes a stipulation on the back of a free pass (either *inter*state or *intra*state) exempting the carrier from liability for its negligence, *binding,* while in Missouri, where the accident occurred in the case now before the court, and in Kansas, where the instant pass was issued, the state law renders such a stipulation *illegal and unenforcible.* Admitting the provisions *of its own state law* made the release *valid,* where the pass was free, the state court of Georgia held that the pass in question in that case, *clearly issued under the provisions of the Hepburn Act, was not, in fact, free.* The only issue that came before this court being: *"Was the pass free?"* (l. c. 577.) This court held that, under the Hepburn Act, *the pass was free,* and that *under the law of the State of Georgia,* the stipulation, in connection with a *free pass,* was *conceded to be binding.*

We believe that confusion has arisen in the mind of counsel for defendant here due to the fact that they have failed to take into consideration the distinction made by the Federal Courts between cases which are *tried nisi in Federal Court* and cases which are *tried nisi in a state court,* and which come into this court by way of certiorari or writ of error. Where the case is tried *nisi* in the

Federal Court, that court applies its own construction of the *common law* on the questions involved, while in cases *tried nisi in the state court,* and coming to this court on writ of error, this court *confines its review to the Federal rights or immunities alleged to have been infringed,* and cannot consider the correctness or incorrectness of the conclusions of the lower court, *insofar as they are merely concerned with questions of state law, statutory or common.*

Williams, Jurisdiction and Practice of Federal Courts, page 193, paragraph 4.

Southern Pac. Ry. Co. v. *Schuyler,* 227 U. S. l. c. 610-612.

Weir v. *Rountree,* 173 Fed. l. c. 779.

Smith v. *A. T. & S. F. Ry.,* 194 Fed. l. c. 81.

Fowler v. *Railroad,* 229 Fed. l. c. 374-5.

Tweeten v. *Railroad,* 210 Fed. l. c. 830-31.

Charleston, etc. Ry. v. *Thompson,* 234 U. S. 576.

Beutler v. *Grand Trunk Ry.,* 224 U. S. l. c. 85.

This rule was followed in the case of *Charleston, etc. Ry.* v. *Thompson,* above mentioned which came into this court by way of writ of error from the state court of Georgia. The only Federal question involved was the character of the pass as to whether it was free or not. It was held to be free under the Hepburn Act, which defines a free pass. The court stated that as the pass was free, *the Georgia State Court conceded* the provisions of the stipulation to be *valid* the same as does the Federal interpretation *of the common law* in the cases of *Northern Pac. Ry. Co.* v. *Adams,* 192 U. S. 440, and *Boering*

v. *Chespeake Ry.*, 193 U. S. 442, which were both *tried nisi in Federal Court* and *before the Hepburn Act in question was passed by Congress.* This case, as to the validity of the stipulation, simply holds that the *state or local law of Georgia on the subject is the same as the Federal interpretation of the common law.*

The case *does not hold* that the Hepburn Act has anything to do with the question of *liability of a carrier* for negligent injury to a person riding on an interstate free pass, *or with the question of the validity of a stipulation as to such negligence* entered into in connection with such pass. *Neither does it hold that Congress, by this Act, has taken over the entire field of liability to the exclusion of state or local law.*

Telegraph and Employers Liability Cases.

The telegraph and Federal Employers Liability cases do not support applicant's position.

With respect to interstate commerce by telegraph, Congress has legislated *specifically and exclusively* as to *classification of service* and *uniformity of rates* for the same class of service throughout the various states. The telegraph cases have arisen in one of two ways: either the state law has imposed a penalty for erroneous transmission of an unrepeated message, or has imposed a penalty for failure to deliver or to deliver promptly. In holding that the several states no longer have this right with respect to *interstate messages*, the Federal decisions and decisions of this court have given the uni-

form reason that Congress has, by *express enactment,* taken over the whole subject of *classification of service* and *uniformity of rates,* and to allow the different states to impose different penalties for erroneous transmission of unrepeated messages (or for any class) would work a destruction both of the *uniformity of classification* and the *uniformity of rates* throughout the various states. Likewise, owing to the peculiar nature of interstate telegraphic communication, it is impossible to tell in what state the violation (or tort) occurred, and as most of the laws are aimed at a failure to deliver, which must take place *in another state,* the laws are *extra territorial in effect,* and therefore clearly beyond the power of the state.

On the contrary, with regard to the present case, the enforcement of the state law as to liability of a carrier for negligent injury within the borders of the state to a person riding on an interstate free pass, and as to the validity of a contract of release from such negligence entered into in connection therewith, cannot affect, *even remotely,* the only two questions dealt with in the section of the Hepburn Act relied upon by defendant, namely:

1. What constitutes a free pass?
2. To whom may a free pass be issued?

The cases cited by applicant under the heading "Assumption of Risk," page 17 of its application and brief, come under the Federal Employers' *Liability Act,* and the title to the Act itself demonstrates that *Congress has*

legislated on the subject of liability. Not only this, but it has legislated as to where actions may be brought, and *what may and may not be set up as a defense.* This is a very clear illustration of where Congress has taken over and created the *entire field of liability.* The question of assumption of risk as a defense is the subject dealt with in the case of *Pryor* v. *Williams,* 41 Sup. Ct. Reporter, No. 4, p. 36, and as Congress has dealt specifically with the question of *assumption of risk* under this title, the case property holds that by the term, assumption of risk, Congress meant to deal with the Federal idea of what constitutes such a risk, and not with a doctrine which is peculiar to Missouri alone.

Conclusion.

To justify the issuance of certiorari under the issues in this case, the court would, of necessity, hold one of two things:

1. That Congress, by the provisions of the Hepburn Act—defining what constitutes a free pass, to whom the same may be issued, and the penalty for issuance to or use by one not entitled thereto—has taken over the entire field of liability of a carrier for negligent injury to a person riding on a free interstate pass, together with the right of the carrier by contract to exempt itself from such liability;

or

2. That the *interstate* character of the passage precludes the state from imposing liability for negligent injury to the passenger within its borders.

As to proposition 1, no language of the Act justifying such an interpretation has been pointed out by defendant carrier or by any court.

This court has repeatedly held that while Congress, under the Federal Constitution, may so legislate as to interstate commerce as to exclude state legislation, or the application of state rules *on the same subject*, yet, until Congress *has so legislated on the particular subject* in such a way as to show an intention to take over the entire field, the states are left free to apply their local laws for acts of misfeasance or non-feasance within their borders, although interstate commerce may be indirectly affected thereby.

Adams Express Co. v. *Croninger*, 226 U. S. 491.

Southern Pac. Ry. Co. v. *Jensen* (opinion of Justice Pitney), 244 U. S. 1. c. 244-246.

Pennsylvania R. R. v. *Hughes*, 181 U. S. 477.

Cases cited in *Adams Ex. Co.* v. *Croninger*, above.

Minnesota Rate Case, 230 U. S. 352.

Milwaukee, etc. Ry. v. *Sloan*, 169 U. S. 133, holds that such local laws are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress *has not legislated upon the particular subject*, they are to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.

. To illustrate this point by an application of the Carmack Amendment, dealt with in the above cases:

> "While the original Interstate Commerce Act, and the amendments thereto, which are commonly referred to as the Elkins Act, and the Hepburn Act, regulated many phases of interstate commerce, *they did not attempt to fix any rules as to the power of a common carrier engaged in interstate commerce, to modify his common law liability, by express contract;* and such power was therefore regulated *by state law*, either written or unwritten."
>
> Page on Contracts, p. 1297, par. 744.

And so it was held in the cases last above cited that until Congress passed the Carmack Amendment, legislating exclusively on the subject of *liability* of the carrier for loss of *merchandise*, and the right to *limit liability by contract*, the states were left free to apply their local laws for matters within their borders, even though in so doing interstate commerce was incidentally affected.

And, in *Chicago, R. I. & Pac. Ry.* v. *Maucher*, 248 U. S. 359, this court, *in upholding a decision based on a local law of the State of Nebraska*, held that the freedom of the states to establish and apply their own laws and policies touching the validity of contracts exempting carriers *from liability to passengers for injuries due to negligence*, was not affected by the Carmack Amendment, which deals only with shipments of property, and that "Its language is so clear as to leave no ground for the contention that Congress intended to deal with the transportation of persons."

It is worthy of note that the provision of the Interstate Commerce Law, urged by defendant as a defense, was in force at the time of this decision.

Moreover, Congress is the *only body* that has the power to take away this state right, and this can be done only by express legislation on the same subject.

Minnesota Rate Case, 230 U. S. 352.

Notwithstanding this express ruling, *applicant for certiorari is asking this court to judicially legislate* into the Hepburn Act something that Congress did not put there.

As to the second proposition above—that the *interstate character* of the passage excludes the right of the state to impose liability for negligent injury to a passenger within its borders—should this view be taken (which is contrary to the decisions of this court above referred to), then the same rule would apply to a passenger *for pay* on an interstate journey, and an interstate railroad would constitute a broad highway through the several states not subject to any state law for local misfeasance or nonfeasance, and with no provision made by Congress for the protection of the passenger.

The petitioner suggests that the language of Judges VanDeventer and Day, in their concurring opinion in *New York etc., Ry. Co.* v. *Mohney,* justifies this contention, but we do not believe the judges in question so intended. Judge VanDeventer, in the case of *Weir* v. *Rountree,* 173 Fed. 780, sitting with Judges Munger and Sanborn, held quite the contrary, it being the opinion of the court in that case, that, absent express congressional legislation on the subject:

> "A carrier exercising his calling within a particular state, *although engaged in business of interstate commerce,* is answerable according to the *law of the state* for acts of nonfeasance or misfeasance committed *within its limits.* * * * The state has the right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, *a contract to the contrary notwithstanding.*"

We also believe that in view of the question actually raised in the present case, this language will be explained by the court as *limited to such cases as are tried originally in Federal Court,* where the Federal Court applies its own interpretation of the common law, *and not applicable to a case tried nisi in a state court, under state law, for negligent injury to a person within its borders,* where a non-Federal question is involved.

The pass in question is free, but would not be so as defendant would attempt to construe it and use it. As a passenger, plaintiff would have her right of action for negligent injury. She would be entitled to safe carriage. Whenever any part of this right is taken away from her in exchange for the privilege of riding without *monetary consideration,* value is given for carriage and it would no longer be a *free* pass as contemplated by Congress in the Hepburn Act. It will be noted that Congress, in defining a free pass, does not say anything as to a contract as to liability for negligent injury to the person riding on it, or grant any authority to limit the right of carriage as distinguished from any other passenger. The pass, in contemplation of Congress, is a

free pass indeed, given without monetary consideration, and taking away from the person using it *none of the rights enjoyed by any other passenger.*

This is a demonstration that Congress did not, by the Hepburn Act, legislate on the subject of liability of the carrier for negligent injury to a person riding on a free pass, or on the subject of a contract as to such liability; otherwise it would provide a consideration for a pass which it defines as free.

Other points urged by applicant simply state parts of the evidence.

In conclusion, we do not believe that the applicant has shown this case to be one of such public interest, gravity and importance as to command the time and attention of this court. It cannot materially affect the rights of defendant for the reason that it is not compelled to issue passes neither does the stipulation affect any other than the plaintiff and defendant in the present case, and the judgment was for a comparatively small amount.

Respectfully submitted,

Charles H. Montgomery.
Attorney for Respondent.

NORMAN A. COX,
HUGH DABBS,
Of Counsel.

No. 142.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

ELIZABETH VAN ZANT, RESPONDENT.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF RESPONDENT.

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November 4, 1922.

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No. 142.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

ELIZABETH VAN ZANT, RESPONDENT.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT.

Respondent in her brief will adopt the plan of plaintiff and refer in this brief to petitioner as defendant and to respondent as plaintiff.

This action was instituted in the Circuit Court of Jasper County, Missouri, at Joplin, by the filing of petition and issuance of summons thereon, August 20, 1917. The case was tried at the April term, 1919, of said court, and judgment entered in favor of respondent (plaintiff below) on the 28th day of May, 1919.

It is undisputed that defendant (the petitioner here) was an interstate carrier of passengers and that plaintiff received her injury, in the State of Missouri, while riding on a pass issued by defendant to her minor son (an employe of defendant, who lived with plaintiff in her household) for her use, without pay, for an interstate journey from Pittsburg, Kansas, through Missouri, to Howe, Oklahoma.

The sole defense pleaded and relied upon was

> "That plaintiff received her injury while on an interstate journey riding on a free pass issued under Article Five of the Federal Law, known as the Interstate Commerce Act, which permits the issuance of said free transportation to employees of railroad companies and their families."

The pass contained a stipulation on the back that

> "The person accepting and using it, thereby assumes all risk of accident and damage to person and baggage;" that said pass, "being interstate, issued under the Federal Law above mentioned, is to be interpreted and controlled in its effect and operation by decisions of the federal courts construing said Federal Act;" "that under said decisions the conditions on said pass above quoted are valid and binding on the plaintiff and by reason thereof, plaintiff having assumed all risk of accident and damage to her person is precluded and prevented from recovering damage on account of *the negligent acts and things alleged in her petition*" (pleading by inference, that she assumed the risk of negligence of defendant).
>
> (Trans., pp. 4-5, folios 8-9.)

Replying, plaintiff *denied that she assumed the risk of accident or damage to her person due to defendant's*

negligence; alleged that her action was based upon, and was to be determined by the law of the State of Missouri; in the court and under the laws of which state the action was brought, and was not based on federal statute or law; that the stipulation on the back of the pass, if it is urged to relieve defendant from liability *for its negligence,* was void both under the law of Kansas, where the pass was issued and under the law of Missouri, where the injury occurred (Trans. 5-6-7, folios 10 and 13).

It was, and is, conceded by defendant that under the law of both Kansas and Missouri, a contract or stipulation on the part of a common carrier to limit liability or relieve itself from liability for damages to a passenger caused by the carrier's negligence is void.

There was no dispute as to defendant's negligence in the trial court, and only such part of the record as affected the single question appealed on was printed by defendant.

The trial resulted in a general judgment in plaintiff's favor.

In its motion for a new trial, defendant did not present or preserve any constitutional point, and the only point presented and claimed to involve a federal question was that the court erred in refusing to follow the law of the federal courts construing said article five (U. S. Compiled Stats. 1916, Sec. 8563) so pleaded by defendant, as determining the validity of the stipulation and release on the back of the pass.

In its assignments of error in the Missouri Supreme Court, defendant, in addition to the point preserved in

its motion for new trial, as above stated, presented this one point somewhat differently by assigning that the court erred in refusing to instruct that under federal law (referring to the free pass provision of the Hepburn Act, above referred to) the stipulation on the back of the pass was valid and binding.

Under Missouri practice only such points as are made issues and are called to the attention of the trial court in a motion for new trial, and are carried into an assignment of errors, and presented to the Appellate Court as distinctive points, may be considered on appeal, and points not so preserved are waived.

Powell vs. Jackson County, 262 Mo. 403.

On certiorari, the United States Supreme Court follows the same practice with the single exception that where some federal question is presented in some other way to the state Appellate Court, and both sides are heard thereon and the state Appellate Court passes on the specific question, then it may be considered on certiorari.

Hiawasa Power Co. v. *Carolina-Tenn. Co.*, 252 U. S. 341-344.

In the present case, with this single question before it on appeal, the Missouri Supreme Court held that:

> "Congress has not legislated on the subject of the rights and liabilities of the parties in cases of interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act (Article Five of Interstate Commerce Act relied upon by defendant) or respecting the validity of stipulations or conditions annexed to such passes

> exempting the carrier from liability and that therefore these matters remain the subject of regulation by the several states."

Applying this local law, the court held that a stipulation relieving the carrier from liability for negligence was void, and affirmed the judgment of the trial court.

Defendant filed in the Missouri Supreme Court a motion for rehearing, making but the single point that the above holding of the court was wrong, and contending that certain federal decisions cited by it, construing the above Act of Congress, held Congress had taken over the entire subject matter of the questions in issue (i. e., as to liability and as to the validity of the stipulation) to the exclusion of the states. This was the same point originally made in the Missouri Supreme Court, and the motion was overruled.

On this record, we have two questions involved, the finding on either one in favor of plaintiff would authorize this court to decide the cause in favor of plaintiff.

FIRST: Independent of the alleged federal question that the stipulation and release pleaded as in defense against plaintiff's right to recovery for personal injury caused by the negligence of the defendant, the judgment in this case is supported by general finding in favor of plaintiff on the issue made in the pleadings

> "That plaintiff did not enter into any contract with defendant, assuming any risk of accident or damage to her person caused by the negligence of defendant, and that the so-called release pleaded in defendant's answer as a waiver of damage caused by

defendant's negligence, does not contain any agreement waiving damage for injury caused by defendant's negligence."

(Trans., pp. 6-7, folio 9.)
(Trans., pp. 6-7, folios 10-12.)

SECOND: Even if the pass had contained a stipulation agreeing that defendant should not be liable for injury to plaintiff caused by defendant's negligence, yet the point made:

> "Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability, and therefore, these matters remain the subject of regulation by the several states."

These questions are to be determined by the laws of the state where the injury occurred and where suit is brought and tried in the State Court.

Plaintiff will discuss these questions under the following points: I (1A and 1B), II and III.

On the first question above stated, it will be noted that the stipulation in the pass in this case merely contains the provision that the person accepting and using it thereby assumed all risk of accident and damage to person and baggage. There is no stipulation in this pass, such as was in the pass in the case of *Northern Pac. Ry. Co.* v. *Adams*, 192 U. S. 1. c. 442, and passes in other cases cited by appellant exempting this carrier from lia-

bility for negligent injury to the passenger, but it simply provides that the person riding on the pass assumes the risk of *accident* and damage to person and baggage.

"Accident," as used in this stipulation, is defined by this court, in *Chicago, etc. Railroad Company* v. *Pullman Company*, 139 U. S., l. c. 86, as follows:

> "Accident or casualty, according to a common understanding, proceeds from an unknown cause, or is an unusual effect from a known cause."
>
> "Accident is generally defined as an unusual and unexpected even *happening without* negligence." Corpus Juris, Vol. 1, Sec. 5, pp. 392-393.

Thus the stipulation as to non-liability for accident and damage to plaintiff's person does not relieve defendant as to liability for damage to plaintiff's person caused by the negligence of defendant, as the parties did not contract with respect to defendant's liability for negligence.

In this respect the stipulation differs from those in the following cases cited by defendant:

Charleston & West. Car. Ry. Co. v. *Thompson*, 234 U. S. 557.

Boehring v. *Chesapeake Beach Ry. Co.*, 193 U. S., l. c. 448.

Where, as here, the judgment of the trial court can be sustained on a ground independent of a Federal question, this court will refuse to review it on certiorari or otherwise.

Southern Pac. Ry. v. *Schuyler*, 227 U. S. l. c. 612.

Defendant's specifications of errors, on page 4 of its brief, although four in number, state the same proposition on which they rely merely in different forms, and are, in substance the same as the proposition contained in the heading under the word "Brief" on page 5, under which it is claimed

> "By the Act of June 29, 1906, Congress assumed possession of the subject of free interstate passes, including stipulations contained therein effecting the liability of carriers to the persons riding thereon in interstate journeys and thereby superseding all state control of the subject."

Defendant does not set out or make citation to any part of the Hepburn Act showing any provision where Congress has taken possession of the subject of free interstate passes, including stipulation contained therein affecting the liability of carriers to persons while riding thereon for injury negligently caused by the carrier. The act contains no such provision. Neither does petitioner cite the court to any decision holding that this is the meaning of the Act of June 29, 1906, known as the Hepburn Act. In fact, all of the decisions cited by appellant are cases which were tried and passed upon prior to the passage of the Hepburn Act, except the case, *Charleston & West. Car. Ry. Co.* v. *Thompson*, 234 U. S. 577, and the other cases, which refer to the Carmack Amendment, relate to property and not injury to persons. These cases will be separately discussed and distinguished hereafter.

Defendant's contention is (and that is the only reason urged against the validity of the judgment of the lower court) that there is some provision in the Hepburn Act through which Congress legislated so as to take over the entire field of liability of carriers to persons riding on an interstate free pass, and the entire field as to the validity of contracts made in connection with such passes, relieving the carrier from damage caused by negligence. It is also urged by petitioner that divisions of the Federal Courts and this court have so construed the act in question, and that because thereof the State of Missouri is precluded from applying its law as to liability and as to the validity of a contract releasing the carrier from liability for its negligence, in cases arising in the state court.

POINTS AND AUTHORITIES.

I.

Federal legislation as to carriage of a person on an admittedly free pass has not occupied the field of liability for negligent injury to such person even on an interstate journey. No attempt has been made to regulate or control this liability, and no mention made thereof. The same is true as to a contract designed to exempt the carrier from such liability. Until Congress does act affirmatively on these subjects, the state court or local forum is free to apply its local laws to a case arising in and tried, *nisi*, in the state court, to determine the question of such liability and the question of the validity or non-validity of such contract, even though in so doing it may indirectly affect interstate commerce contracts of carriage.

Hepburn Act, Sec. 8563 (5) p. 9069, U. S. Compiled Stats. 1916.

Maucher v. *C. R. I. & P. Ry.*, 248 U. S. l. c. 362-363.

Savage v. *Holmes*, 225 U. S. 501-533.

Pennsylvania Ry. Co. v. *Hughes*, 191 U. S. l. c. 487-8.

Corpus Juris, Vol. 12, p. 18.

Southern Pac. Ry. Co. v. *Schuyler*, 227 U. S. l. c. 610-12.

Clark v. *Southern Ry. Co.*, 119 N. E. 539.

Weir v. *Roundtree*, 173 Fed. l. c. 779-80-81.

Smith v. *A. T. & S. F. Co.*, 194 Fed. 81.

Southern Pac. Ry. v. *Jensen*, 244 U. S. l. c. 244.

Wiley v. *Grand Trunk Ry.*, 227 Fed. l. c. 129.

For illustration of the point by analogy and distinction of cases, see other cases cited under our Point II, and

Fowler v. *Railroad,* 229 Fed. l. c. 375.
Simpson, et al. v. *Shepard* (Minnesota Rate Case) 230 U. S. p. 352.
Page on Contracts, Vol. 2, p. 1297.

(A) In passing on the question of liability of the carrier for negligent injury to a person riding on a free pass, and the question of the validity of a contract exempting the carrier from such liability, even where the case is tried, *nisi*, in the Federal Court, that court does not determine these questions by reason of any provision of the Hepburn Act, (Sec. 8563 (5) p. 9069, U. S. Compiled Statutes for 1916) but by its own interpretation of the common law.

Southern Pacific Co. v. *Schuyler*, 227 U. S. l. c. 610-612.
Weir v. *Roundtree*, 173 Fed. l. c. 779-80-81.
Smith v. *A. T. & S. F. Ry. Co.*, 194 Fed. 81.
Martin v. *Pittsburgh, etc. Ry. Co.*, 203 U. S. 284, Sec. 8563 (5) p. 9069 U. S. Compiled Stats. for 1916 Anno. West P. Co. Edition.

(B) The United States Supreme Court and the Federal Courts uniformly hold that where, as in the present case, the stipulation on the back of a free pass is void under the local law where the injury occurred, and where the case is tried, *nisi*, in the state court and comes into the Federal Court by way of writ of error or certiorari, the state or local law, as to liability of the carrier for neg-

ligent injury to the person and as to the validity or non-validity of the stipulation purporting to exempt the carrier from such liability, will prevail and be enforced by the Federal Court on review from the state court. It is only where the case is tried, *nisi*, in Federal court, either by being originally instituted in that court or when brought there for trial, *nisi*, by the process of removal, that the Federal Court will apply its own interpretation of the common law.

Williams, Jurisdiction & Practice in Federal Courts, page 193, paragraph 4.
Southern Pac. Ry. v. *Schuyler*, 227 U. S. l. c. 610-612.
Weir v. *Roundtree*, 173 Fed. l. c. 779.
Smith v. *A. T. & S. F. Ry.*, 194 Fed. l. c. 81.
Fowler v. *Railroad*, 229 Fed. l. c. 374-5.
Tweeten v. *Railroad*, 210 Fed. l. c. 830-31.
Charleston, etc. Ry. Co. v. *Thompson*, 234 U. S. 576.

II.

Authorities cited by defendant do not deal with the questions here involved, and are not in point. They fall under the class of cases tried, *nisi*, in Federal Court, on which comment has been made heretofore, or arise either under the Federal enactments with regard to the carriage of interstate telegrams or express, or under Federal enactments with regard to Employers' liability, in both of which cases the Federal Congress has dealt at length with and has occupied the entire field of liability of the carrier, including the subjects of the action and the defenses thereto.

III.

The stipulation on the back of the free pass in the instant case, does not cover the matter of a negligent injury to the *person* of the passenger riding on the pass, and there is no contract in this case purporting to exempt the carrier from liability for such negligent injury. Where a case may be sustained independent of a Federal question, the holding of the state court will not be disturbed.

Cases illustrating distinction here made:

Northern Pac. Ry. Co. v. *Adams,* 192 U. S. l. c. 442.

Charleston & West Carolina Ry. Co. v. *Thompson,* 234 U. S. 557.

Boehring v. *Chesapeake Beach Ry. Co.,* 193 U. S. l. c. 448.

Corpus Juris, Vol. 1, Sec. 5, pp. 392-393.

Southern Pac. Ry. Co. v. *Schuyler,* 227 U. S. l. c. 612.

ARGUMENT.

Four things are to be kept constantly in mind in the argument of this case:

(1) Plaintiff received her injuries within the State of Missouri while riding on a pass *admittedly free.*

(2) The stipulation on the back of the pass to the effect that plaintiff assumed all risk of accident or damage to her person *is conceded to be void* both under the law of Missouri where the injury occurred, and under the law of Kansas, where the pass was issued.

(3) Plaintiff instituted her action in a Missouri State Court, based on Missouri State law and the common law as interpreted by Missouri State courts, to recover for injuries to her person caused by the negligence of defendant.

(4) For the purposes of appeal it was conceded that plaintiff was entitled to recover the amount of the judgment agreed upon in the trial court unless the Hepburn Act, pleaded as a defense, cut off her right of action based on Missouri law.

Keeping these four propositions in mind, the determination of one question by this court in plaintiff's favor will affirm the judgment of the Missouri Supreme Court. This question is:

Did the Congress of the United States, by the passage of the Hepburn Act, defining what constitutes a free pass and to whom the same may be issued, occupy

the entire field of jurisdiction and control over the carriage of gratuitous passengers by railroad, including the field of liability for negligent injury to the passenger—to the exclusion of the right of a Missouri State court to apply and enforce its State Laws for the protection of the life and limb of persons being carried within the borders of the state on free pass, where the injury to the person is caused by the negligence of the carrier?

That Congress did not so occupy this particular field, and that Congress never intended by this enactment to interfere with state laws made for the protection of the life and limb of the traveling public is made clear from a proper consideration and interpretation of the decisions, both state and federal.

Prior to the enactment by Congress of the so-called Carmack Amendment to the Acts of Congress regulating interstate and foreign commerce (which amendment applies only to the carriage of freight or express) each particular state—*notwithstanding Congress had passed an act regulating interstate commerce*—was left free to enact and enforce its local laws as to the carrier's liability or to apply its own rules as to public policy, even though in so doing it might incidentally affect interstate carriers in their commercial relations.

The correctness of the foregoing statement, and the *reason why*, the federal law after the enactment of the Carmack Amendment, superseded and abrogated these local or state laws, is clearly set forth in the opinion of the Supreme Court of the United States in *Adams Express Co.* v. *Croninger*, 226 U. S. 491.

In the foregoing opinion, speaking of, and upholding the right of the state to determine the liability of the common carrier prior to the Carmack Amendment, at local citation 488, the court said:

> "While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, *we look in vain for any regulation of the matter here in controversy.* There is no sanction of agreements of this character limiting liability to stipulated valuations, and, *until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject,* although it may to this extent indirectly affect interstate commerce contracts of carriage?"

Further, along this same line, quoting from the opinion local citation 504:

> "Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both federal and state courts, was either that of the general common law as declared by this court and enforced in the federal courts * * * or that determined by the supposed *public policy of a particular state,* * * * or that prescribed by statute law of a particular state."

In *Pennsylvania Ry. Co.* v. *Hughes,* 191 U. S. l. c. 488, the court held:

> "It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic."

It is a well recognized principle of law that although the Constitution of the United States contains an express *grant to Congress* of the power to regulate interstate and foreign commerce, nevertheless, until Congress has acted, and acted in such a manner *as to take over the entire field*, the states are left free to apply their own laws and views of public policy in matters incidentally affecting interstate carriers in their commercial operations. The powers of the Congress of the United States are those *granted* by the Constitution of the United States. The powers of the various states within their own respective borders are inherent, and can only be cut down by express limitation in the Constitution of the United States.

The dissenting opinion of Mr. Justice Pitney, in the *case of Southern Pacific Railway Co.* v. *Jensen*, 244 U. S. l. c. 244-5-6, has grouped a number of instances where Congress, while enacting laws regulating interstate commerce, has yet failed to take over, by legislative enactment, certain subjects relating thereto, and in which the federal courts have uniformly held that the states were left free to announce and enforce their own policies and laws even though in doing so they incidentally affected interstate carriers in their commercial relations. Speaking of the Carmack Amendment, and the effect it had on state laws imposing liability on carriers, Judge Pitney, at local citation 244, said:

> "So it required an Act of Congress (the so-called Carmack Amendment to the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, 595) to impose a uniform rule of liability upon rail carriers

for losses of merchandise carried in interstate commerce *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 504. In a great number and variety of cases state laws and policies incidentally affecting interstate carriers in their commercial operations have been sustained by this court, in the absence of conflicting legislation by Congress."

To the same effect is the opinion in *Adams Express Co.* v. *Croninger*, above cited, wherein, at local citation 500, the court said:

"But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular state, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the state. *Such regulations would fall within that large class of regulations which it is competent for a state to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the state over such carriers and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected:* *Smith* v. *Alabama*, 124 U. S. 465; *New York &c. Railroad* v. *New York*, 165 U. S. 628; *Chicago, Milwaukee & St. P. Ry.* v. *Solan*, 169 U. S. 133, 137; *Richmond &c. Ry.* v. *Patterson Co.*, 169 U. S. 311; *Cleveland &c. Ry.* v. *Illinois*, 177 U. S. 514; *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477. In the Solan case, cited above, it was said of such state legislation:

"'They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has

> not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.'"

Referring again to the case of *Adams Express Co. v. Croninger*, above cited, the court, at local citation 504, states the *reason why* the Carmack Amendment changed the situation, and took away from the various states the right to declare and enforce their own rules of liability as to a common carrier engaged in interstate commerce, as to the carriage of express or freight. Summed up, this reason is stated in the opinion at local citation 505, as follows:

> "That legislation (Carmack Amendment) supersedes all the regulations and policies of a particular state *upon the same subject* of the *liability of the carrier* under a bill of lading which he must issue and limits his power to exempt himself by *rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but* that Congress intended to *take possession of the subject.*"

And further:

> "To hold that the liability therein declared may be increased or diminished by local legislation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose *to take possession of the subject.*"

Quoting from local citation 504 above referred to, the court holds:

"The significant and dominating features of that amendment are these: * * *

Second. Such initial carrier is made *'liable to the lawful holder thereof for any loss,* damage, or injury to such property caused by it.'

Third. It is also *made liable* for any loss, damage, or injury to such property caused by 'any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass.'

Fourth. It *affirmatively declares* that *'no contract,* receipt, rule or regulation *shall exempt* such common carrier, railroad or transportation company *from the liability hereby imposed.'*"

It will be noted that in the above case a bill of lading was issued in the State of Kentucky, and, on the back thereof, was a stipulation limiting the carrier's liability to the declared value of the goods shipped. Under the local, or Kentucky law, this contract limiting the recovery was invalid, and the shipper could recover the actual value. The Carmack Amendment expressly covered this same question of liability, and, for this reason, the court in the above case, at local citation 506, said:

"The *duty to issue* a bill of lading and *the liability thereby assumed are covered in full* (in the Carmack Amendment) and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt *a uniform result* and relieve such contracts from the *diverse regulation* to which they had been theretofore subject."

The parenthesis is ours.

In other words, Congress established a uniformity of rates and classification of service with regard to the

carriage of freight and express, and *itself made provision for the liability of the carrier growing out of the contract of carriage.*

An analysis of the foregoing opinion and of the *reasons* of the court for holding that the state laws were superseded by the Act of Congress in the Carmack Amendment clearly demonstrates that the Hepburn Act as to the issuance of free passage *has not abrogated* or affected the right of our state court to enforce its local laws as to the *liability* of defendant to plaintiff in the present case.

The Hepburn Act, with relation to a free pass, simply defines what shall constitute a free pass; to whom the same may be issued, and provides a penalty for use of such pass by or the issuance thereof to a person not coming within the excepted class.

The act in no way attempts to deal with or regulate *the subject of liability* on the part of the carrier for negligent injury to a person to whom such a pass is legally issued, while riding on such pass. It creates no such liability and gives no cause of action therefor, but is wholly silent on *the subject*. As before stated, even when a cause of action is tried, *nisi*, in a Federal Court, for negligent injury to a passenger by a carrier, even when the passenger is riding on a free pass, the Federal Court does not determine that the liability exists from any provision of the Hepburn Act; neither does it enforce such liability by reason of any provision of the Hepburn Act. It goes to the common law, as interpreted by the Federal Courts, to establish the liability and to enforce it. On this ques-

tion of *liability*, the sole province of the Hepburn Act is to determine what constitutes a free pass.

Neither does the Hepburn Act refer to or attempt to deal with the question or *subject* of the right of the carrier to *contract* with the person riding on a free pass as to the carrier's liability. The carrier is under no obligation to issue the pass in any event.

Our position is sustained by the opinion of this court in *Maucher* v. *Chicago R. I. & P. Ry.*, 428 U. S. l. c. 362-363. This was an action for personal injuries in a case tried in the state court and brought to this court on writ of error. The trial court held, as did the Missouri court in the instant case, that liability was to be determined by the law of the State of Nebraska. This was affirmed by the Supreme Court of Nebraska. In deciding this case and discussing the question, this court declared the law as follows:

> "The railway admits that prior to the enactment of the Carmack Amendment (Act of June 29, 1906, c. 3591, No. 7, 34 Stat. 584, 595) Congress had not dealt with the right of carriers to limit by contract their liability for injuries occurring in interstate transportation, and that consequently the states were free to establish their own laws and policies and apply them to such contracts. *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477. But it contends that this power of the states was superseded by the Carmack Amendment, since that amendment, dealt with the power of carriers to contract in respect to such liability; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Boston & Marine Railroad* v. *Hooker*, 233 U. S. 97; that it was the

> intention of Congress to deal with the whole subject; and that the rights of plaintiff in respect to personal injuries is governed by the federal law. But the Carmack Amendment deals only with the shipment of property. Its language is so clear as to leave no ground for the contention *that Congress intended to deal with the transportation of persons.*"

On the contrary, the Carmack Amendment, with respect to interstate carriage of freight, *expressly provides the liability* and the *means of enforcement thereof.* It *expressly forbids the making of any contract limiting that liability.* Moreover, it compels the issuing of the bill of lading, and regulates the provisions thereof, as well as regulating the rates of carriage and the class of service.

The *subject* dealt with in all the express company cases, that is, the *liability of the carrier,* and the question of a contract limiting that liability, has been expressly provided for or against; the right of action provided for and *given* and the method of *enforcement* of the liability are expressly provided for in the Carmack Amendment itself.

Only three matters are legislated upon by Congress in the Hepburn Act with regard to a free pass:

(1) The free pass is defined.

But, in the present case, the pass is admittedly a free pass.

(2) The excepted class to whom free passes may be issued are set forth.

But it is defendant's contention here that respondent came within the excepted class, and could legally receive and ride on the pass.

(3) A penalty is imposed for illegal issuance or use of a free pass.

But no such illegal issuance or use is claimed or occurred in the present case.

The question, then, is: As no provision of the Hepburn Act is violated, and as Congress *is silent on the question of liability* of the carrier to a person legally riding on a pass for negligent injury to such person, wherein has Congress taken over the *subject of this action* so as to abrogate state law as to such liability?

We now take up the line of cases which directly deals with the liability of the carrier of a passenger riding on a free pass for injury to that passenger.

In this discussion it will be well to bear in mind the distinction heretofore made as to the way in which cases reach the Federal Court. On the one hand the case might originally be brought in the Federal Court or taken to the Federal Court from the State Court by removal. By either method the Federal Court has original jurisdiction of the cause of action and, consequently, applies its own rules and ideas of what might be termed the Federal Common Law with relation to the subject of negligence. On the other hand, the case might be brought and tried originally in the State Court, and after decision in the State Court, be taken to the Federal Court on writ of error on the ground that some federal question or law that has arisen therein has been erroneously construed and applied in and by the State Court. In this latter

instance, the Federal Court will *follow* the interpretation of the State Court in applying the state or local law and will simply ascertain whether or not the *State Court,* in applying such state law, has incorrectly interpreted or applied any federal law arising therein. Indeed, if the judgment of the State Court can stand independent of the ruling of the federal question involved, whether that ruling be right or wrong, the Federal Court will not disturb the judgment of the State Court. This rule is clearly set out in Williams on Jurisdiction and Practice of Federal Courts, page 193, paragraph 4, as follows:

> "In so far as questions of general jurisdiction are concerned the federal courts have always held that they were bound to decide for themselves, though leaning toward an agreement with the views of the State Court. It must be understood that I speak here of cases where the *responsibility of original decision rests upon the federal* courts, and not of cases coming to the Supreme Court upon a writ of error to the State Court of final jurisdiction. In cases of the latter sort, the Supreme Court *confines its review to the federal rights or immunities alleged to have been infringed,* and cannot consider the correctness or incorrectness of the conclusions of the lower court, *in so far as they are merely concerned with questions of state law, statutory or common.*"

Moreover, in dealing with the Hepburn Act as to free passes, an examination of the cases arising *nisi* in the Federal Court will show that the *liability* was determined *not* by any provision of the Hepburn Act, but by the common law as interpreted by the federal courts.

the only province of the Hepburn Act in the decision being to define what constituted a free pass.

The case of *Southern Pacific Co.* v. *Schuyler*, 227 U. S. l. c. 610, a case where deceased was killed while riding on a free pass on an interstate journey, recites the rule as follows:

> "Whether the Hepburn Act prohibits a carrier from giving free interstate transportation to the employes of the Railway Mail Service when they are not on duty but are traveling for their own benefit or pleasure, is, of course, a federal question.
>
> But whether—assuming that question be answered in the affirmative—the relation of carrier and passenger arises in the case of gratuitous passage under circumstances such as are presented in this case, is (in the absence of an Act of Congress regulating the matter) a question not of federal but of state law.
>
> It is settled by numerous decisions of this court that where the decision in the State Court adverse to the plaintiff in error proceeds upon two independent grounds, one of which, not involving a federal question, is sufficient to sustain the judgment, the writ of error will be dismissed or the judgment affirmed, according to the circumstances."
>
> See cases cited in opinion.

The following discussion, in connection with the various federal cases therein cited and analyzed, establishes beyond question the fact that plaintiff's right of action in the present case, as well as the validity of a contract as to defendant's liability, *is to be determined, in this action, by state law* and not by federal law.

The sole federal question that can arise in the pres-

ent case is as to whether or not the pass on which plaintiff was riding at the time of her injury was a free pass. As it is conceded that it was a free pass, and as the Hepburn Act relating to the issuance and use of the free pass contains no provision relating to the liability of the carrier to a person riding on a free pass, or relating to the subject of a contract limiting any such liability, the only federal question that could ever have arisen in connection with this case has been taken from the case.

The sole question left is this: Is the validity of the stipulation on the back of the pass to the effect that plaintiff assumed all risk of accident and damage to person or property to be determined by the local laws of the State of Missouri, where the injury to plaintiff occurred —the action having been brought in a Missouri State Court—or by the common law as interpreted by the federal courts?

That this is to be determined by the local or state law is no longer an open question.

As establishing this proposition, and for the purpose of illustrating the distinction made between cases such as the present one, on the one hand, and cases that are tried, *nisi*, in the Federal Court, on the other (either by being brought originally in the Federal Court or by being transferred to the Federal Court by the process of *removal* in a proper instance) we group and quote from:

> First. Cases tried, *nisi*, in state courts, and which come into the Federal Court by writ of error to the State Court:

Second. Cases tried, *nisi,* in the Federal Court (including cases taken from the State Court, for trial *nisi,* to the Federal Court by the process of removal).

We first take up group one, where, *just as in the present case,* the trial *nisi* was in a state court. In this group it will be seen that the local, or state law determined the question of liability, as well as the validity of a contract made to limit that liability, and, where the case reached the Federal Court on some federal question, by writ of error, the Federal Court *determined the liability under state or local law* and limited its inquiry to a determination of whether or not the State Court, in applying its local law, misinterpreted some federal statute. As we will point out hereafter in this argument, this is precisely what was done in the case of *Charleston, etc., Ry. Co.* v. *Thompson,* 234 U. S. 576.

In *Southern Pacific Co.* v. *Schuyler,* 227 U. S. l. c. 612, the court said:

> "* * * We have examined the evidence in the record and *find that it fairly supports the conclusion of the State Court* that deceased was accepted by *plaintiff in error* as a gratuitous passenger.
>
> But finally it is argued (b) that it was beyond the power of the State Court to 'read into the Hepburn Act an exception in favor of gratuitous passengers'; thereby (as is said) enlarging the class to whom Congress limited the right of free interstate transportation. This is ingenious, *but, as we think, unsound.* . As applied to the concrete case, it is equivalent to saying that the operation of the

> Hepburn Act is such as to deprive one who, in good faith and without fraud, and with the consent of the carrier, but in actual though unintentional violation of the prohibition of the act, accepts a free passage in interstate transportation, *of the benefit of a rule of local law that renders the carrier in such circumstances responsible for exercising care for the passenger's safety* because the carrier has voluntarily undertaken the burden of such care."

The same *ingenious but unsound argument* is urged in the present case by defendant to the effect that respondent should be deprived of the benefit of the local, or Missouri law, which declares a contract, such as the one printed on the back of the pass in the present case, exempting the carrier from liability for its negligence, is void as a matter of public policy.

The United States Supreme Court, in the above case, holds this argument unsound, and not supported by any provision of the Hepburn Act, at local citation 612, where it says:

> "But the act itself declares what penalty shall be imposed for a violation of its provisions: 'Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty, etc., * * *. This penalty is not to be enlarged by construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous interstate passage. *The deceased no more forfeited his life, limb or safety,* **and no more forfeited his right to the protection accorded by the local law to a passenger in his**

situation than the carrier forfeited its right of property in the mail car upon which the deceased rode. *His right to safe carriage was not derived,* **according to the law of Utah,** *from the contract made between him and the carrier,* and therefore **was, not deduced from a supposed violation of the Hepburn Act.** It arose from the fact that he was a human being, of whose safety the *plaintiff in error* had undertaken the charge. With its consent he had placed his life in its keeping, *and the* **local law** *thereupon imposed a duty upon the carrier irrespective of the contract of carriage.* **The Hepburn Act does not deprive one who accepts gratuitous carriage,** under such circumstances, **of the benefit and protection of the law of the state in this regard.**"

"It results that the judgment under review must be affirmed, irrespective of the question whether the Hepburn Act forbids the giving of free interstate transportation to the employes of the Railway Mail Service when not on duty."

The above decision shows conclusively that irrespective of any prohibition in the Hepburn Act as to the giving of a free pass, the question of defendant's liability for plaintiff's injury will be determined by the laws of the State of Missouri under which the action is brought and on which it is based. This must abide the ultimate determination of the cause by the state court of last resort.

The United States Circuit Court of Appeals of the Eighth Circuit, in which Missouri is located, in an opinion by Judge Munger, concurred in by Judges Sanborn and Van Devanter, the latter now being a member of the United States Supreme Court, in the case of *Weir*

v. *Roundtree,* 173 Fed. l. c. 779, 780, 781, is decisive on this question. In discussing this question, beginning at l. c. 779, the court said:

> "It was further held that, as Congress had not, in the exercise of its power over the interstate commerce, legislated with respect to such contracts, that it was open to the states to determine the validity of such a contract. The court cited the case of *Chicago, Milwaukee, etc. R. R. Co.* v. *Solan,* 169 U. S. 133, and quoted therefrom the following:
>
> 'A carrier exercising his calling within a particular state, although engaged in business of *interstate commerce is answerable according to the law of the state for acts of nonfeasance or of misfeasance committed within its limits.* * * * The rule prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law.'
>
> 'The state has the right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a *contract to the contrary notwithstanding.*'"

Here the court in the opinion cites the case of *Martin* v. *Pittsburg & Lake Erie Ry. Co.,* 203 U. S. 284, in which it was held that the question was a local question for the state to determine. This is followed in the opinion by Sections 5857-5858 of the Statutes of Kansas, which were introduced in evidence in this case. Thus, we see that in the present case the contract of release on

the back of the pass on which the plaintiff, Mrs. Van Zant, was riding, was void not only in the State of Missouri, where the injury occurred, but likewise void in the State of Kansas where the pass was issued. In discussing this the United States Court of Appeals used the following language (*Weir* v. *Roundtree*, 173 Fed. l. c. 780):

> "The Supreme Court of that state (Kansas), construing these sections, have held that a railroad company could not contract in advance for the waiver and release of the statutory liability imposed upon every railroad company organized or doing business in that state, and that a contract in contravention of this statute was void."

In the case of *Smith* v. *A. T. & S. F. R. R. Co.*, 194 Fed. 81, decided February 14, 1912, long after the passage of the Hepburn Act, and when the Hepburn Act contained the same provisions it now does, in discussing this identical question, the United States Circuit Court of Appeals of the Eighth Circuit, in an opinion by Judge Amidon, concurred in by Judge Van Devanter and Judge Riner, announced the law on this question to be that a release of the kind pleaded by the defendant in the answer in this case must be decided according to the local law of the state where the injury occurred. The pass in the case of *Smith* v. *A. T. & S. F. R. R. Co.*, was issued under the laws of the State of Kansas, where the court says, that the provision of waiver of damage on the back of the pass was void under the Kansas Statutes, but the injury occurred in the State of

Oklahoma, under whose law the contract of waiver and release on the back of the pass *was valid* (just as such a contract is valid under the laws of the State of Georgia, which was under consideration in the case of *Charleston Railway Company* v. *Thompson*, 236 U. S. 376, relied upon by defendant in this case). In this case, 194 Fed. l. c. 81, the Court of Appeals says:

> "In such cases (referring to contracts for release for damages in case of torts by passenger against carrier), the law of the place where the injury occurs defines the rights of the parties."
>
> (Citing 183 U. S. 263; *Weir* v. *Roundtree*, 173 Fed. 776).

Further quoting:

> "The courts have uniformly held that a contract exempting a carrier from liability for negligence, valid at the place of its execution and delivery, will not avail as a defense when the injury occurs in a state by whose laws such contracts are declared to be void as against public policy. (That is, if the contract was valid in the state where the pass was issued and injury should occur in the State of Missouri, where the contract was void as against public policy, it would constitute no defense.) Having adopted that rule when the law of the place of the injury would impose a liability upon the carrier, can a contrary rule be adopted when such law would protect the carrier by enforcing the contract? We think not. The contract is by its terms tied to the tort, and the same law should be applied to the one as to the other. * * * Such being the nature of the pass, the condition on its back accompanied its use. *If that condition was void by the law of the state where the injury occurred, it would be disregarded. If it was valid, it would be enforced.*"

(The parenthesis is ours.)

To further illustrate and clarify the distinction above made, we now discuss a few cases where, *unlike the present case,* the trial, *nisi,* was in a Federal Court, either from having been started there in the first instance, or from having been transferred to the Federal Court by the process of *removal.* As we have heretofore said, in such instances, the Federal *trial court,* instead of following the local or state law as to liability—as the entire question of liability is submitted to the Federal forum—applies its own interpretation of the *common law* as to that liability. In a consideration of the following cases coming within this group, we again call the court's attention to the necessity of bearing in mind the distinction to be made as to the *first group,* where the trial, *nisi,* is in a State Court, and where, as we have seen, the local or state law as to liability is to be applied, even by the Federal Court in taking the case, on writ of error to the State Court.

Fowler v. *Railroad Co.,* 229 Fed. 374-375, *was brought originally in the Federal Court.* The question was squarely presented as to whether the Federal Court should apply its own interpretation of the common law, or should follow the local, or state laws. The court, at l. c. 375, said:

> "We think the contention that the contract or release must be construed by the laws of the State of Pennsylvania because the accident occurred there cannot be maintained. The question of the validity of the release is one not to be determined by local law, but **in suits in the United States**

Courts by decisions of those courts and by the general law, and, in the absence of a statute holding such a release invalid, the United States Courts will uphold them unless prohibited from doing so by some controlling authority. The law of the United States Courts seems to be settled that the courts of the United States (referring to trial courts) are not controlled by state decisions but are at liberty to adopt their own views of the law."

So, in the case of *Beutler* v. *Grand Trunk R. R. Co.*, 224 U. S. 85, the same distinction is made, in the following language:

> "So it has been decided that *in cases* **tried** *in the United States courts we must follow our own understanding of the common law* when no settled rule of property intervenes."
>
> * * * * * *
>
> "It may be that *in the State Court* the question would be left to the jury."

The case of *Wiley* v. *Grand Trunk R. R. Co.*, 227 Fed. l.c. 129, while being distinguished from the present case in that the injured passenger was riding on a "drover's pass" (which is held to import a consideration, so that the pass is not, in fact, gratuitous), *clearly* announces the distinction in the following:

> "The only issue raised by this motion is the validity of the release. If the plaintiff had been a gratuitous passenger, there is no doubt but under the decisions of the United States Supreme Court the release would have been valid *in the Federal Courts* in the absence of willful or wanton negligence *irrespective of the Hepburn Act. Northern Pac. R. R. Co.* v. *Adams*, 192 U. S. 440; *Boering* v. *Chesapeake, etc., Ry. Co.*, 193 U. S. 442."

Thus, the court announces that in suits *in the Federal Court, i. e., tried nisi in that court,* that the Federal Court will apply its own interpretation of the common law, but that this will be *irrespective of the Hepburn Act.* The opinion continues:

> "But the plaintiff would not have been a gratuitous passenger prior to the Hepburn Act, for the reason that right to ride without special compensation was given in part consideration of the payment which was principally for other services. * * *
>
> Here we are brought to the vital question involved in this motion.
>
> *Has Congress by the Hepburn Act, so-called, regulated the invalidity of such a release as is this, to the exclusion of the law of the state? In my judgment* **it has not.**"

We direct the court's attention to the fact that there is not a word in the Hepburn Act referring to the question of a contract for a release from liability in connection with the issuing of a free pass. The above case is conclusive to the effect that the Hepburn Act has nothing to do with a case such as the one now before the court, where the pass was admittedly free.

Further quoting:

> "The release does not offend either the letter or spirit of the interstate commerce legislation of Congress."

Further, in paragraph 3, of the opinion:

> "The plaintiff's right to safe carriage and the question whether the relation of passenger and carrier exists in the absence of any Federal *statute* regulating the matter are therefore *matters of*

state law. Southern Pacific Co. v. *Schuyler*, 227 U. S. 601. So that the ultimate question is: **What is the state law which influences the validity or invalidity of the release?''**

To answer this question in the present case, we repeat that under both the law of Kansas, where the pass was issued, and under the law of Missouri, where the injury occurred, **the release was invalid.**

Some of the Federal authorities, including the United States Circuit Court of Appeals for the Second Circuit, are to the effect that the validity of such a release is to be determined by the local or state law of the state where the pass was issued, while the Eighth Circuit, in which is located the State of Missouri, holds that it is to be determined by the local law of the state where the injury occurred. This makes no difference in the present case in view of the fact that the release is invalid in either case.

Tweeten v. *Railroad*, 210 Fed. l. c. 830-831, was one where the case was transferred by *removal* from a State to a Federal Court for trial *nisi*. In making the same distinction which we are here making, the court said:

> "The rule is otherwise in the Federal Court, and the plaintiff, a citizen of the State of Washington, while he might, on the ground of the lineman's negligence, *have had a good cause of action in the State Court* in which the action was originally begun, was deprived of that right when the defendant, *a corporation of New Jersey*, **removed** *the cause to the court below*. (i. e., into the Federal Court for trial, *nisi*.)"

With reference to this question of *removal* from a State to a Federal Court, we call the court's attention to the state of the record in this case. The case was originally filed in the Jasper County, Missouri, Circuit Court, and, on application of defendant transferred to the Federal Court by process of removal on the claim that a Federal question was involved. But the Federal Court held that it was improperly removed from the State Court, and sent it back to the State Court for trial, *nisi*.

The case being tried *nisi* in the State Court, must be tried under state laws.

We direct the court's attention, also, to the fact that in such cases as *Northern Pac. Ry. Co.* v. *Adams*, 192 U. S. 440, and *Boering* v. *Railroad*, 190 U. S. 442, cited by defendant, brought originally in the Federal Court or transferred thereto by the process of removal, and tried *nisi* in the Federal Court, that court, in passing on the question of the validity of a release on the back of a free pass, *does not base its decision on any provision of the Hepburn Act*, but on the principles of common law as interpreted by the Federal Court. This is apparent when it is noted that these cases arose eight and two years respectively before the Hepburn Act of 1906 was adopted.

It appears, conclusively, from the above analysis of the cases, under the two groups within which they naturally fall, that the court, in determining the validity of the release agreement on the back of the pass in this case cannot consider, as authorities in point for appellant, any cases such as the following:

1st. Cases that are originally brought in, or transferred to, by removal, the Federal Court, for trial *nisi*.

2nd. Cases which deal with the Carmack Amendment, for in these the Federal Statutes have been extended so as to cover the entire field of liability, including the right of action, the defenses, and the question of the right to limit the liability by contract, all of which are covered by Congress by express legislative enactment.

3rd. Cases wherein the local law of the state (unlike Missouri and Kansas) such as Georgia and Oklahoma, declare a contract exempting a carrier from liability to a person riding on a free pass is *valid under state law*.

4th. Cases, such as the telegraph cases, where Congress has taken over the entire field as to rates and service, and the matter of contract as to such rates and service, and has placed the whole subject under the direct control of the Interstate Commerce Commission.

Cases falling within any of the above classifications are not in point for defendant here, but, on the contrary, when properly analyzed, and the *reason for the decision* examined, are authorities in support of plaintiff's claims.

Defendant relies chiefly on the case of *Charleston & West Carolina Ry. Co.* v. *Thompson*, 234 U. S. 576. This case is not an authority for defendant, as it applied the state or local law of Georgia to determine the question of the validity of a stipulation on a pass exempting the carrier from liability for its negligence on review in the Federal Court, and the sole Federal question in-

volved was whether or not the pass in question was, in fact, free.

In that case, the plaintiff, a member of the family of an employee of the railway company, was riding on a pass issued without cost, on an interstate journey. On the back of the pass was a stipulation exempting the carrier from liability for negligent injury to the person riding thereon, *which stipulation was valid and enforcible under the local law of Georgia where the injury occurred.*

Under the law of Missouri *such a stipulation is void.*

The Georgia *nisi prius* court held the pass a free pass, and as the law of Georgia recognized the validity of the stipulation exempting the carrier from liability for its own negligence, held that there could be no recovery.

On appeal, the Georgia Appellate Court held such a stipulation binding in a free pass, but held that the Hepburn Act created an exception and that a so-called free pass under that act issued to a member of an employe's family really *was not a free pass* but was issued upon consideration of the services of the employe. It held that the jury might infer that the pass was issued for value.

The United States Supreme Court, on writ of error to the Georgia Court of Appeals, after holding that the Hepburn Act means what it says when it defines such a pass as a free pass, and that the question of whether the pass was, in fact, free, was the sole Federal question involved in the case, held, at local citation 578:

"As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals (of the State of Georgia), as we have stated, and is established by the decisions of this court (*not by the provisions of the Hepburn Act*). *Ry. Co.* v. *Adams*, 192 U. S. 440, and *Boering* v. *Chesapeake Beach R. R. Co.*, 193 U. S. 442."

It will be noted from the above quotation that the court held that the validity of the stipulation *was conceded* by the Georgia court, and simply decided that as the pass was free, there could be no question as to the validity of the stipulation.

In the present case, applying the ruling in the Georgia case above cited, as the pass is admittedly free, this sole Federal question is removed from consideration, and, *applying the local law of Missouri* (or Kansas, for that matter) to the question of the right of the carrier to exempt itself from liability to plaintiff by contract, *we find that such a contract is void as against public policy.*

A well reasoned case in which the facts are very similar to those in the case before this court is that of *Clark* v. *Southern Ry. Co.* (Ind.), 119 Northeastern 539. We commend this entire opinion to the court, as it points out many of the distinctions we have made, and interprets *Charleston, etc., Ry. Co.* v. *Thompson*, 234 U. S. 576, as we have in this argument.

After discussing, at l. c. 542, the provision of the Hepburn Act requiring common carriers to file with the Interstate Commerce Commission schedules of rates,

fares and charges, and the rules or regulations which change these rates, fares or charges, and the provision that if they are not so filed, they shall be void, the court, at l. c. 542, col. 2, says:

> "The word, 'rate,' as used in the Interstate Commerce Act, means the net cost to the shipper; the net amount the carrier receives and retains for the transportation service.
>
> * * * * * * * *
>
> It is apparent that each of these words—rates, fares, charges—as used in the Commerce Act, has in it the idea of compensation for services performed. A free pass, however, is otherwise. As we have said, it calls for gratuitous service voluntarily performed."

There then follows a discussion, at l. c. 543, to the effect that Congress never contemplated that the schedule so filed should include gratuitous passes.

There follows an analysis of such cases as *Adams Express Co.* v. *Croninger; Charleston, etc., Ry. Co.* v. *Thompson*, above cited, and of the Carmack Amendment.

To the following, we direct the court's especial attention. At l. c. 546, col. 2, in discussing the case of *Charleston, etc., Ry. Co.* v. *Thompson*, the court said:

> "The cause reached the Federal Supreme Court on a writ of error, and while that court recognized as sound the principle announced by the State Court that such an exemption is valid only as against a free pass, the question actually considered and decided was that such a pass issued under the Hepburn Act is in fact free. As that question

involves the construction of a United States statute, it was a Federal question. By reason of that question the Federal Supreme Court assumed jurisdiction. That case does not hold that Congress by the Hepburn Act has entered the legislative field of free passes to the extent that all state regulations bearing on the subject are suspended.

"The general purpose back of the Hepburn Act is, as we have said, the establishing of equality in rates, fares, and charges for the transportation of persons and property, and the preventing of unfair discrimination. Formerly public carriers might and actually did, issue free passes at pleasure. Through such an instrumentality it was possible for them to accomplish the opposite of the purposes of the Hepburn Act. The section now under consideration is in harmony with the general spirit of the act. It specifies the classes to whom free passes may be issued. The nature of the specified classes is such that unfair discrimination is not likely to result from the issuing of passes to them. The subject-matter of the section is merely to whom free passes may issue. It contains no provision respecting the rights of the carried or the liabilities of the carrier under such a pass or what stipulations or conditions may lawfully be promulgated or specified respecting the use of passes so issued, or how such stipulations or conditions must be brought to the attention of the carried, if at all. We do not believe that the Hepburn Act in any of its provisions suspends the operation of either the Indiana statute or the section of the Kentucky Constitution above set out as relating to passenger traffic. When Congress legislates merely respecting a certain element of a general subject, the field is not thereby invaded so as to suspend state legislation or state law dealing with other elements of the general subject and not inconsistent with the Federal legislation. Thus in *Minneapolis, etc., Co.*

> v. *Popplar*, 23 U. S. 369, 35 Sup. Ct. 609, 59 L. Ed. 1000, the court deals with an action involving the Federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Statutes at Large, 531, and Act March 2, 1903, c. 976, 32 Statutes at Large 943 (U. S. Comp. St. 1916, Sections 8605-8615), respecting which the court says:
>
> 'The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The Federal statute in the present case touched the duty of the master at a single point, and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state.' "

The telegraph and Federal Employers Liability cases cited by defendant do not support its position.

With respect to interstate commerce by telegraph, Congress has legislated *specifically* and *exclusively* as to *classification of service* and *uniformity of rates* for the same class of service throughout the various states. The telegraph cases have arisen in one of two ways; either the state law has imposed a penalty for erroneous transmission of an unrepeated message, or has imposed a penalty for failure to deliver or to deliver promptly. In holding that the several states no longer have this right with respect to *interstate messages*, the federal decisions and decisions of this court have given the uniform reason that Congress has, by *express enactment*, taken over the whole subject of *classification of service* and *uniformity of rates*, and to allow the different states to impose different penalties for erroneous transmission of unrepeated

messages (or for any class) would work a destruction both of the *uniformity of classification* and the *uniformity of rates* throughout the various states. Likewise, owing to the peculiar nature of interstate telegraphic communication, it is impossible to tell in what state the violation (or tort) occurred, and as most of the laws are aimed at a failure to deliver, which must take place *in another state,* the laws are *extra territorial in effect,* and therefore clearly beyond the power of the state.

These cases are based on prior cases, such as *Western Union Telegraph Company* v. *Brown,* 234 U. S. 542, which was a suit for mental anguish for failure to deliver a message in the District of Columbia, dispatched from South Carolina, the law providing the right of action being a law of South Carolina.

It was held by the court that, as the failure to deliver was in another jurisdiction, the tort being committed there, and to uphold the law of South Carolina for the failure to deliver in the District of Columbia, would be to give to the law of South Carolina an extra territorial effect and, further, that the law was an attempt to regulate the conduct of the telegraph company throughout the entire distance and, therefore, interfere with interstate commerce with respect to telegraph companies, of which Congress had taken exclusive control.

On the contrary, with regard to the present case, the enforcement of the state law as to liability of a carrier for negligent injury within the borders of the state to a person riding on an interstate free pass, and as to the validity of a contract of release from such negligence entered into in connection therewith, cannot affect, *even remote-*

ly, the only two questions dealt with in the section of the Hepburn Act relied upon by defendant, namely:

1. What constitutes a free pass?

2. To whom may a free pass be issued?

The cases cited by applicant under the heading of "Assumption of Risk," come under the Federal Employer's *Liability Act*, and the title to the act itself demonstrates that *Congress has legislated on the subject of liability*. Not only this, but it has legislated as to where actions may be brought, and *what may and may not be set up as a defense*. This is a very clear illustration of where Congress has taken over and created the *entire field of liability*. The question of assumption of risk as a defense is the subject dealt with in the case of *Pryor v. Williams*, 41 Sup. Ct. Reporter, No. 4, p. 36, and as Congress has dealt specifically with the question of *assumption of risk* under this title, the case properly holds that by the term, assumption of risk, Congress meant to deal with the federal idea of what constitutes such a risk, and not with a doctrine which is peculiar to Missouri alone.

As to other cases cited by defendant as authority, we have heretofore pointed out the distinction to be made in such cases as arise and are tried *nisi* in the Federal Court, where the Federal Court applies its own interpretation of the common law with respect to the question of liability of the carrier for the negligent injury of persons, irrespective of any provision of the Hepburn Act. As the present case arose and was tried *nisi* in a state court, as heretofore, on a review of the decision of the State Court

by the Federal Court on writ of certiorari, the Federal Court will apply the local or state law as to liability.

The judgment of the trial court in plaintiff's favor is supported by sufficient ground, on the issues made, entirely outside of and independent of any federal question claimed to have been raised in the case, and defendant never appealed on this issue.

Defendant pleads *in haec verbae* a contract on the back of the pass as a defense to its liability to plaintiff for *defendant's negligence* resulting in plaintiff's injury. This contract so pleaded (Trans. 5, folio 9), on its face shows that it *does not contain* any provision releasing defendant from liability to plaintiff *for its negligence*, but only from liability for *accident* and damage to her person and baggage. Plaintiff *denies* that the stipulation or contract relieved defendant from liability to her for injuries *caused by defendant's negligence* (Trans. pp. 67, folios 10 and 12). Independent of the general denial in defendant's answer, plaintiff was entitled to judgment on the pleadings.

Accident, as used in this stipulation, is defined by this court in *Chicago, etc., Railroad Company* v. *Pullman Company*, 139 U. S., l. c. 86, as follows:

> "Accident or casualty, according to a common understanding, proceeds from an unknown cause, or is an unusual effect from a known cause."
>
> "Accident is generally defined as an unusual and unexpected event happening without negligence."
>
> Corpus Juris, Vol. 1, Sec. 5, pp. 302-303.

Thus the stipulation as to non-liability for *accident* and damage to plaintiff's person does not relieve defendant as to liability for damage to plaintiff's person *caused by the negligence of defendant*, as the parties did not contract with respect to defendant's liability for negligence.

In this respect the stipulation differs from those in the following cases cited by defendant:

Charleston & West. Car. Ry. Co. v. *Thompson*, 234 U. S. 577.

Northern Pac. Ry. Co. v. *Adams*, 192 U. S. l. c. 442.

Boehring v. *Chesapeake Beach Ry. Co.*, 193 U. S. l. c. 448.

In each and all of which cases the contract of release on the back of the pass contained, in substance, the specific provision that the party accepting the free pass agreed that the defendant carrier should not be liable for damage or injury to person *caused by the negligence* of the agents of such carrier.

Where, as here, the judgment of the trial court can be sustained on a ground independent of a federal question, this court will refuse to review it on certiorari or otherwise.

Southern Pac. Ry. v. *Schuyler*, 227 U. S. l. c. 612.

Counsel for respondent respectfully urges that the judgment of the Missouri Supreme Court should be affirmed.

CHARLES H. MONTGOMERY,
Attorney for Respondent.

Joplin, Mo., Nov. 4th, 1922.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* VAN ZANT.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 142. Argued December 4, 1922.—Decided January 2, 1923.

1. By forbidding common carriers engaged in interstate commerce to issue free passes for interstate journeys, except to specified classes of persons, (Hepburn Act, 1906,) Congress took over the

subject to the exclusion of state laws, not only as to what passes may be issued and used, but also as to their limitations, conditions and effect upon the rights and responsibilities of the passenger and railway company, respectively. P. 468.

2. A condition affixed to a free pass, issued under the Hepburn Act, that the person accepting and using it assumes all the risk of accident and personal injury, is valid. P. 468.

289 Mo. 163, reversed.

CERTIORARI to review a judgment of the Supreme Court of Missouri, affirming a judgment recovered by the respondent from the Railway Company in an action for personal injuries suffered by her, in that State, while she was traveling from Kansas to Oklahoma by means of a free pass, which had been issued to her as the mother of one of the company's employees.

Mr. Samuel W. Moore, with whom *Mr. Frank H. Moore* and *Mr. Cyrus Crane* were on the brief, for petitioner.

The original Act to Regulate Commerce, passed in 1887, did not expressly prohibit free transportation, and it was only when such transportation constituted discrimination and was not in the exception contained in § 22 of the act that it was illegal. The first general prohibition of free transportation, and the first express authorization of free transportation, except in certain specified instances permitted by § 22, appeared in the amendment of 1906. In the Act of April 13, 1908, a proviso was added expanding the meaning of the word "employees." In the amendment of June 18, 1910, which is not involved herein, a further proviso was added making provision for the exchange of passes or franks with telegraph, telephone and cable lines.

The evident purpose of Congress, in its amendment of 1906, was to bring the whole subject of interstate transportation under direct national control. The issue of free transportation, unregulated except by the general

anti-discrimination provisions of the Act of 1887, and by the several States whose efforts to enforce their statutes were not attended with great success, had resulted in gross discrimination. National legislation of a comprehensive character, therefore, was imperatively necessary to provide one uniform rule covering the subject of free transportation, and one uniform method of its enforcement. The amendment of 1906 was responsive to this demand.

Congress, we contend, reached out and took over the entire subject of free interstate transportation, specifying with particularity the persons to whom it might lawfully be issued and providing penalties for infractions of the law by individuals as well as the carriers. This of necessity deprived the States of all power or authority to legislate with respect to such transportation. The exertion of national power would be frustrated and nullified if authority remained in the several States to encroach upon or in any manner to affect the subject-matter with conflicting statutes or decisions.

The stipulation in a free interstate pass releasing the carrier from liability is a part of the pass itself. The pass is a license, and the person to whom it is issued is a licensee. *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440, 454. The terms and conditions on which it is issued and given validity are an integral part of the license itself. A release of all claims for personal injuries has always been a condition to the use of free transportation. Such a stipulation was upheld in 1858. *Welles* v. *Railway Co.*, 26 Barb. 641; affd. 24 N. Y. 181.

The fact that the release was on the back of the pass instead of on its face is of no consequence. The pass consisted of writing and printing on both sides of the paper. This was the pass over which Congress assumed jurisdiction by the amendment of 1906. That part of the pass which consists of the release, equally with that

part which authorized the plaintiff to travel free was thus withdrawn from the domain of state legislation.

Congress is presumed to have enacted the amendment of 1906 with full knowledge of the decisions of this Court in *Northern Pacific Ry. Co.* v. *Adams, supra;* and *Boering* v. *Chesapeake Beach Ry. Co.*, 193 U. S. 442. It knew that the usual release stipulation was an integral part of the pass itself, and that the use of a free pass involved a waiver on the part of the carrier of its compensation, and likewise a waiver on the part of the user of the pass of any claim for damage to his person. It may also be assumed that Congress knew of the conflicting state statutes, some of which gave and others denied compensation.

The validity of a stipulation against liability contained in a free interstate pass issued by a railway company under the Act of 1906 came before this Court in *Charleston & Western Carolina Ry. Co.* v. *Thompson*, 234 U. S. 576.

A pass is ordinarily conditioned to be non-transferable and subject to forfeiture if presented for passage by any other than the person to whom it was issued. Is the validity of these provisions to be tested by state statutes and decisions of state courts? Passes also contain a time limit, during which they are valid for passage. Is this likewise subject to state regulation? Following the passage of the Act of 1906, the Interstate Commerce Commission promulgated various rulings relative to the issue of free interstate transportation, prescribing its form, designating the persons who come within its provisions, defining the word "family" as used in the act, etc. I Watkins, Shippers and Carriers, 3d ed., pp. 648–652. May these rulings and regulations be amended or repealed or superseded by state authority? Many other illustrations might be given.

The confusion that would result is aptly illustrated by the confusion which actually existed in the enforcement

of a carrier's liability for loss or damage to freight shipments prior to the amendment of 1906. *Adams Express Co.* v. *Croninger*, 226 U. S. 491.

The Act of 1906, providing for the issue of free interstate transportation, is silent on the subject of the liability of the pass-holder for personal injuries; but this is no answer to our contention that the federal authority has taken over the entire subject of free interstate transportation, including the stipulations upon which it may be issued, and their validity. *Postal Telegraph Co.* v. *Warren-Godwin Lumber Co.*, 251 U. S. 27; *Western Union Telegraph Co.* v. *Boegli*, 251 U. S. 315.

Similarly, it has been held by this Court that the Federal Employers' Liability Act has occupied the entire field with respect to the liability of carriers for damages to employees, to the exclusion of state control. *New Orleans & Northeastern R. R. Co.* v. *Harris*, 247 U. S. 367; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147; *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492; *Pryor* v. *Williams*, 254 U. S. 43.

The same argument that is made by the respondent here might be urged in support of the proposition that as the statute was silent touching the transferability of mileage, excursion or commutation passenger tickets, that subject was not taken over by Congress, but remained subject to state regulation. But this Court, in *Bitterman* v. *Louisville & Nashville R. R. Co.*, 207 U. S. 205, decided otherwise.

The stipulation against liability contained in the pass was a contract entered into pursuant to federal authority. The Hepburn Act permitted carriers to issue free interstate transportation to employees and their dependents, and, by necessary implication, to issue such transportation on the usual and customary conditions. In authorizing the issuance of a free pass, Congress likewise authorized this inseparable incident to all free transporta-

tion. The parties to such a contract authorized by an act of Congress are entitled to have its validity determined and its terms construed in accordance with the rules which obtain in the federal courts to the exclusion of the rules which obtain in state courts. *Tullock* v. *Mulvane*, 184 U. S. 497; *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin*, 241 U. S. 319; *Missouri, Kansas & Texas Ry. Co.* v. *Harriman*, 227 U. S. 657.

Mr. Charles H. Montgomery, for respondent, submitted.

Federal legislation as to carriage of a person on an admittedly free pass has not occupied the field of liability for negligent injury to such person even on an interstate journey. No attempt has been made to regulate or control this liability, and no mention made of it. The same is true as to a contract designed to exempt the carrier from liability. Until Congress does act affirmatively on these subjects, the state courts are free to apply their local laws, even though, in so doing, they may indirectly affect interstate commerce contracts of carriage. Hepburn Act, § 1, c. 3591, 34 Stat. 584; *Chicago, Rock Island & Pacific Ry. Co.* v. *Maucher*, 248 U. S. 359; *Savage* v. *Jones*, 225 U. S. 501; *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601; *Clark* v. *Southern Ry. Co.*, 69 Ind. App. 697; *Weir* v. *Roundtree*, 173 Fed. 779; *Smith* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 194 Fed. 81; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Wiley* v. *Grand Trunk Ry. Co.*, 227 Fed. 129; *Fowler* v. *Railroad Co.*, 229 Fed. 375; *Minnesota Rate Cases*, 230 U. S. 352.

In passing on the question of liability of the carrier for negligent injury to a person riding on a free pass, and the question of the validity of a contract exempting the carrier from such liability, a federal court does not determine those questions by reason of any provision of the Hep-

burn Act, but by its own interpretation of the common law. *Southern Pacific Co.* v. *Schuyler, supra; Weir* v. *Roundtree, supra; Smith* v. *Atchison, Topeka & Santa Fe Ry. Co., supra; Martin* v. *Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284.

Where the stipulation on the pass is void under the local law where the injury occurred and where the case is tried in the state court, the state law will be enforced by this Court on review from the state court. It is only where the case is tried originally in a federal court, or brought there for trial by the process of removal, that the federal court will apply its own interpretation of the common law. Williams, Juris. & Pr. in Fed. Cts., p. 193, par. 4; *Southern Pacific Co.* v. *Schuyler, supra; Weir* v. *Roundtree, supra; Smith* v. *Atchison, Topeka & Santa Fe Ry. Co., supra; Fowler* v. *Railroad Co., supra; Tweeten* v. *Railroad Co.*, 210 Fed. 830; *Charleston & Western Carolina Ry. Co.* v. *Thompson*, 234 U. S. 576.

Authorities cited by defendant fall under the class of cases tried in a federal court, or arise either under the federal enactments with regard to the carriage of interstate telegrams or express, or under federal enactments with regard to employers' liability, in both of which cases Congress has dealt at length and has occupied the entire field of liability of the carrier, including the subjects of the action and defenses.

The stipulation on the back of the free pass in the instant case does not cover the matter of a negligent injury to the person of the passenger riding on the pass, and there is no contract in this case purporting to exempt the carrier from liability for such negligent injury. The case may be sustained independently of a federal question, and, for that reason also, the holding of the state court should not be disturbed. *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440; *Charleston & Western Carolina Ry. Co.* v. *Thompson, supra; Boering* v. *Chesapeake*

Beach Ry. Co., 193 U. S. 442; *Southern Pacific Co.* v. *Schuyler, supra.*

MR. JUSTICE MCKENNA delivered the opinion of the Court.

The case presents the effect of a condition in a free pass issued by petitioner to respondent and used by her in transportation in interstate commerce—whether determined by the provisions of § 1 of the Hepburn Act (34 Stat. 584) or by the laws of Kansas and Missouri.

There is practically no dispute about the facts. The pass was authoritatively and gratuitously issued and she sustained injuries in Missouri while using it in an interstate journey. This injury she alleged, and prayed judgment against the Railway Company in the sum of $25,000.

The Railway Company opposed the pass to the action. It contained the following condition: "The person accepting and using it, thereby assumes all risk of accident and damage to person and baggage."

The company averred that it was an interstate carrier by rail and issued the pass "under Art. 5 [1] of the Federal Law, known as the Interstate Commerce Act," and it was to be "interpreted and controlled in its effect and operation by decisions of the Federal Courts" construing the act.

To the defense respondent replied that at the time of receiving the pass she resided in Kansas, and that in accepting it "she did not and could not assume the risk of accident or damage to her person and baggage, caused by the negligence" of the company, and that the condition upon the pass expressing such effect was void under the provisions of Art. 3, c. 98, of the General Statutes of

[1] This reference is evidently to a subdivision of § 8563 of the publication known as "U. S. Compiled Statutes, 1916."—Reporter.

the State of Kansas, 1915, relating to railroads and other carriers, and that, under the statutes and the common law of Kansas, the condition was against public policy.

She further pleaded that under the laws of Missouri the condition was also against public policy and void, and that the action was not, and is not, brought "upon any Federal Statute or any Federal law, but upon the common law liability in force" in Missouri and that "the action was and is brought in the Circuit Court of Jasper County, Missouri, under the laws of the State of Missouri," and that the company's liability to her was to be determined by the laws of that State.

The trial court took and expressed the view that the condition upon the pass was void under the laws and public policy of both States, and ruled that the condition upon it constituted no defense to the action and excluded it from the case. Declarations of law recognizing the relevancy and controlling effect of the condition were refused.

The court thereupon found for respondent (plaintiff) and fixed her damages at $8,000—that amount having been stipulated as representing her injury. Judgment was entered for that amount, and was affirmed by the Supreme Court of the State.

The Supreme Court discussed at some length the Hepburn Act, the extent of its regulation, and what it permitted to state powers or excluded from them, and said, adopting the language of a Supreme Court Commissioner of the State, "Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several States."

The comment concedes the supremacy of federal control, and leaves only the inquiry, Has control been exerted in the Hepburn Act?

The act was passed June 29, 1906, and was an amendment to the Interstate Commerce Act of 1887. It was, as the act it amended was, a regulation of carriers in interstate commerce, and it provided that "no common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families. . . ." And a carrier violating the act is subject to a penalty, and any person not of those excepted, who uses the pass, is also subject to a penalty.

The provision for passes, with its sanction in penalties, is a regulation of interstate commerce to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of, not only their permission and use, but the limitations and conditions upon their use. Or to put it another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of responsibility the railroad incurs by their issue, and the extent of the right the person to whom issued acquires, are taken charge of. And that responsibility and those rights, this Court has decided, the railroad company can control by conditions in the passes. Antecedently to the passage of the Hepburn Act, we decided that a passenger who accepts a free pass may exempt a carrier from responsibility for negligence, and no public policy is violated thereby. *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440; *Boering* v. *Chesapeake Beach Ry. Co.*, 193 U. S. 442.

Those cases were considered and applied as giving validity to the stipulations of passes issued under the act

in *Charleston & Western Carolina Ry. Co.* v. *Thompson*, 234 U. S. 576, according thereby freedom of transportation to the possessor of a pass, and giving assurance to the railroad company that its gratuity will not be given the consequences of compensated right and its incident obligations, and be a means of exacting from the company indefinite damages. In this case the prayer was for $25,000—the recovery was for $8,000. Circumstances might have made it the larger sum—and this, it is the contention and decision, is the determination of state laws which could neither permit nor forbid the gift. We cannot assent. The pass proceeded from the federal act; it is controlled necessarily in its incidents and consequences by the federal act to the exclusion of state laws and state policies, and such is the effect of the cited cases.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

ST. LOUIS MALLEABLE CASTING COMPANY *v.*